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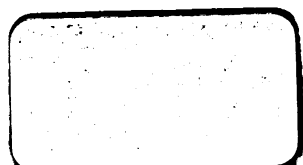
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A DISSERTATION
ON THE
STATUTES OF THE CITIES OF ITALY,
&c. &c.

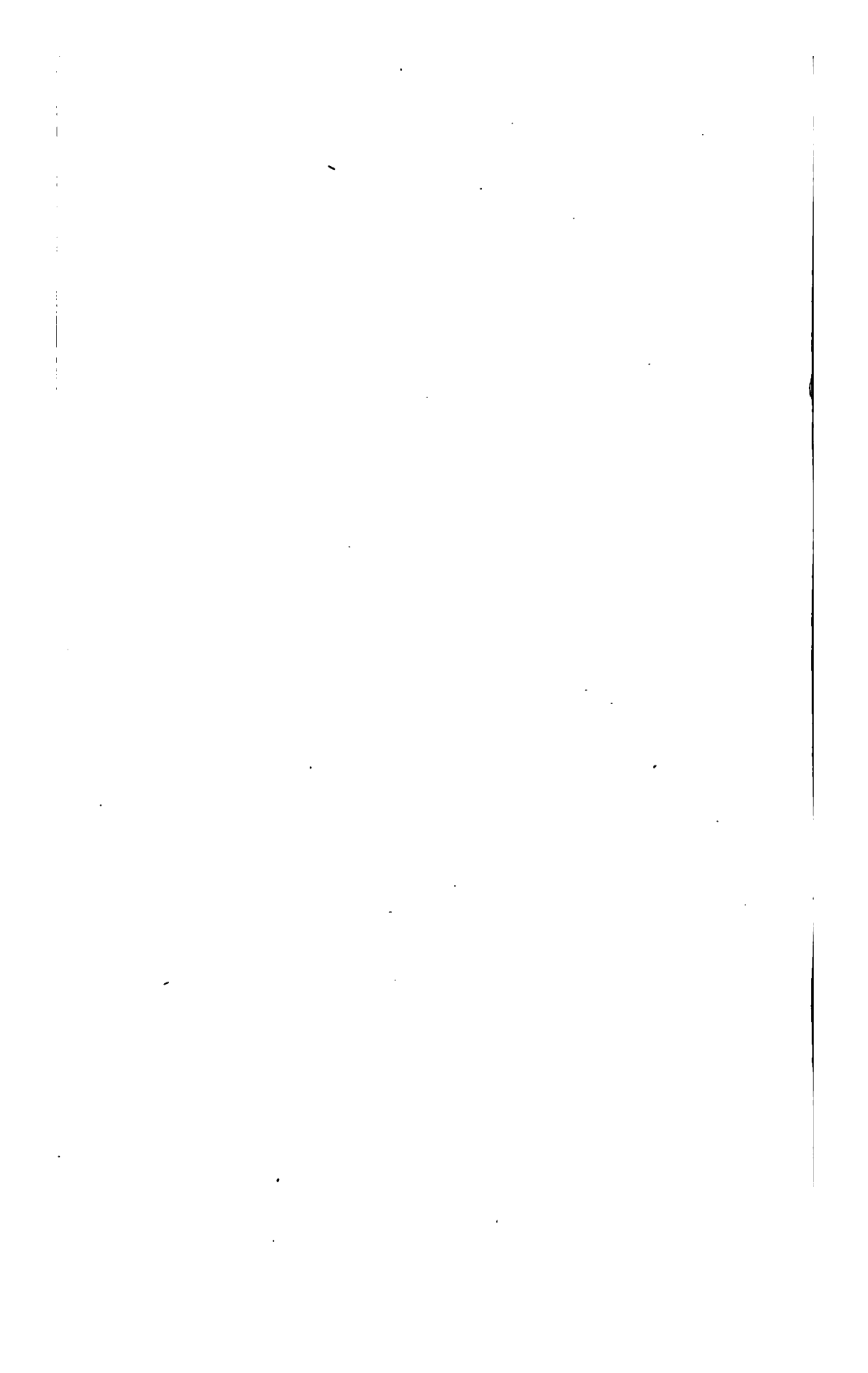
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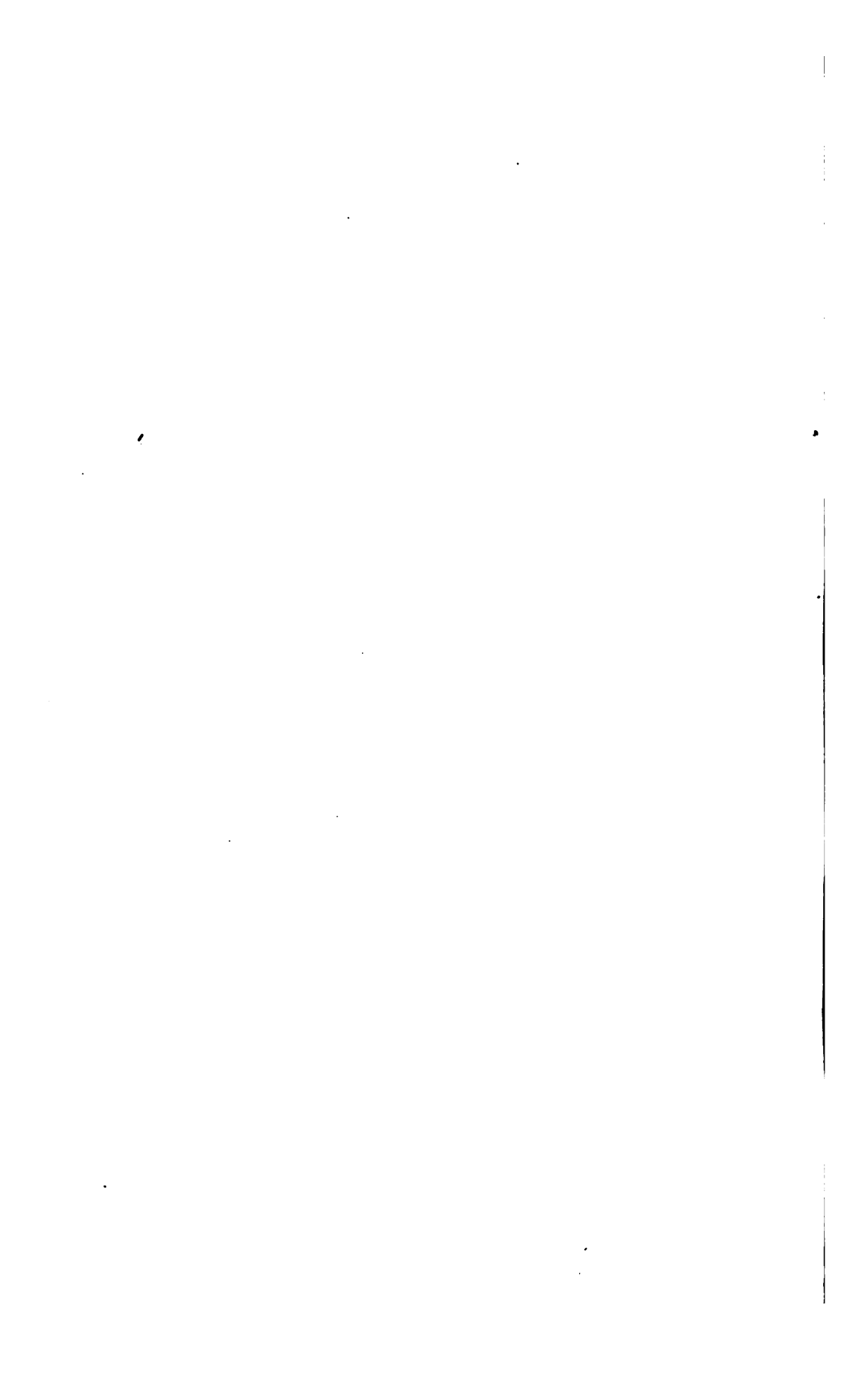
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A
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&c.



A
DISSERTATION
ON THE
STATUTES OF THE CITIES OF ITALY;
AND
A TRANSLATION
OF THE
PLEADING OF PROSPERO FARINACIO
IN
DEFENCE OF BEATRICE CENCI
AND HER RELATIVES:
WITH NOTES.

BY GEORGE BOWYER, Esq.
OF THE MIDDLE TEMPLE.

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DISSERTATION
ON THE
STATUTES OF THE CITIES OF ITALY.

THE following dissertation is intended as a sketch of an interesting but somewhat neglected portion of legal antiquities and history; namely, of the rise and characteristics of the statutes of the Italian cities; and it will be attempted to bring together in these pages the most important legal and historical points touching those very interesting monuments of the municipal legislation of the middle ages, which are only to be found scattered about in a number of books not easily procured.

The exact state of Italy after the invasion of the barbarians had borne down and overwhelmed the just and splendid laws of the Romans, and raised their own barbarous laws upon the ruins of the classical jurisprudence, and the effect of the invasion of the Lombards on the municipia, or little republics who were in the enjoyment of the *jus Italicum* under the paramount authority of the Roman empire, are

Gravina,
De Ort. et
Progress.
Jur. Civ.
cap. cxxxix.

interesting subjects of research, but their consideration would withdraw us too much from our object; we will therefore pass over that period of darkness, which is so eloquently and energetically stigmatized by the Roman Gravina (whose warmth against the laws of the barbarians gave mortal offence to Blackstone), and proceed to the restoration of the imperial law to its former glory. “*Legum autem Romanarum oraculis post diuturnum silentium suscitatis, Italia, jam pridem oblita sui, respexit tandem ipsa sese, inque suis legibus vetustam imperii majestatem recognovit, recepitque per eas in toto subjecto sibi olim terrarum orbe, si non imperium, at saltem nominis auctoritatem; quæque vires dominationis amiserat, ratione in posterum imperavit;*” “*nostris enim legibus omnes populi submisere fasces; quique ab imperio desciverant Romanorum, eorumdem sapientiæ perpetuo paruerunt.*”

Gravina,
De Ort. et
Progress.
Jur. Civ.
cap. cxli.

In the twelfth century the school of Bologna first gave the impulse to and led the way in the study of the Roman law, which afterwards exercised so powerful an influence over the destinies of Italy.

Tiraboschi,
Stor. della
Litter.
Ital. vol. iv.
(lib. 2.)
p. 355 et
seq.

In that and the succeeding century, the legal science took decidedly the lead of all other sciences. Italy soon became rich in illustrious schools of law. The doctors of those schools were the oracles of the cities in which they lived, and the different cities and states vied with each other in showing honour and offering dignities

and power to the great civilians. In fact, the civil law was the path to power, and was held to be the highest qualification for the most important public functions, according as, indeed, it is expressed in the letter which Justinian placed in the commencement of his institutes. So high a state of cultivation of the legal science (though not uninfected with the barbarism of the times) could not but have a powerful effect on the development of the municipal law of the Italian cities.

Inst.
Proem.
§ vii.

But nothing contributed so much to the rise of the municipal law of Italy as the peace of Constance. There certainly were municipal statutes before the eleventh century. Thus (a) Charlemagne confirms local usages:—"Ut longa consuetudo quæ utilitatem publicam non impedit pro lege servetur," and the existence of municipal laws at a very remote period is asserted by Muratori; but those laws were entirely subordinate to the Lombard or afterwards the Roman law. They were *lex sub graviore lege*, and may be compared with bye laws in our jurisprudence, which are valid only so far as they are not contrary to the common law.

Murator.
Antiqu.
Ital. Med.
Ev. Diss.
xxxii.
vol. ii.

(b) The peace of Constance, concluded

(a) Vid. Canciani, Leg. Barbaror. vol. v. p. 22. Canciani observes, that the words of Charlemagne are taken out of the Corpus Juris Theodosiani, or out of the Breviarium Aniani. By a law of Pipin no custom was to prevail against enacted law, *nulla consuetudo superponatur legi*.

(b) Vid. Canciani, Leges Barbarorum, vol. v. Monitum in Monumenta Legalia, pp. 12, 13.

A. Dom. M.CXXXIII. between the Emperor Frederic I. and the confederated Lombard cities, as well as several powerful lords, by confirming the liberties of the Italian cities, was the origin of the municipal statutes of these cities, the multitude of which grew so overwhelming in the course of the three following centuries.

Duck, De
Autoritate
Jur. Rom.
l. 1. cap. 3.
§ iv.

That important treaty granted and confirmed to the cities *jura regalia*. The most important of these is the power of legislation, and that alone is sufficient to justify the great attention and reverence paid to it by the civilians. (c) It was inserted in the Corpus Juris, commented upon with the greatest care and labour, and was held to be the very foundation of the public law of Italy.

We have now established what were the two great causes of the origin and development of statutory law in Italy; viz., first, the rise, cultivation, and paramount general authority of the

(c) Muratori, in his dissertation (Diss. lviii.) on the subject, (*Antiqu. Ital. Med. Ævi.*) shows that the text of the treaty of Constance inserted in the Corpus Juris is incomplete and inaccurate, and learnedly establishes the genuine text and reading of that celebrated document by collation of numerous manuscripts. The great variation in the number of cities included in different copies of the treaty may be accounted for by the probability that in each part of Italy that portion of the text was valued and attended to by the people which regarded themselves, and the remainder neglected, and jealousies among the cities and states may have contributed to this. Canciani, in his *Leges Barbarorum*, gives the *Instrumentum Pacis Constantiæ*. (Canc. vol. v. p. 48, et seq.)

Roman law ; and secondly, the confirmation of the legislative power in the republics into which Italy was divided, and which were for the most part the lawful descendants and representatives of the Roman municipia. We must now enter into an investigation of the history and legal meaning of the word *statutum*, and *statutorium jus*, as contradistinguished from *jus commune*.

(d) The “*præcipuus locus*” of this learning is the law “*omnes populi*” of Gajus, in which he writes that all nations who are governed by laws and customs are ruled partly by law peculiar to themselves, and partly by law common to all men ; hence is drawn the idea of a *statute* law, as contradistinguished from *common* law. Thus Albericus de Rosata says, “*Statutum est jus proprium quod quilibet populus sibi constituit in scriptis redigendum, et per hoc separatur a consuetudine.*”

L. s. ff.
tit. De
Just. et
Jur. ; et
D. D. ad
h. l. ; et
Inst. l. 1.
tit. ii. § 1. ;
et Vinnius
ad h. loc.

Alb. de
Ros.
Tract. de
Statut. in
princ.

Now, the Roman law was held to be the *commune jus* of those populations that formed part of the Roman empire, in the same manner as natural law, or *jus gentium*, was by Gajus said to be common to all mankind ; hence the terms “*jus commune*” or “*gius comune*” were and are still used by the civilians as meaning the imperial law. The celebrated treatise (e) of

(d) Confer. Duck, de Author. Jur. Civ. lib. ii. cap. iii. § xxviii.

(e) De Usu et Autoritate Juris Civilis Romanorum per Dominia Principum Christianorum, lib. ii. : authore Arthuro Duck, LL.D. M.DCXLVIII.

Arthur Duck contains an account of the disputes which took place in many countries respecting the authority of the Roman law as common law, but it will appear upon examination that in by far the greatest part of Europe the imperial law was the common law of the land, either as having been acknowledged to be so under the public law of the empire, or admitted to be binding as written reason.

Ex. grat.
vid. Fari-
nac. Con-
sult. Crim.
Consil. lxxvi.
et passim.

(f) Upon the same principles the imperial law is called by the civilians *Lex* (κατ' ἐξοχην) and as contradistinguished from *statutum*. The word *statutum* is also used according to the strict meaning of the law *omnes populi* as signifying the municipal law of each nation as contradistinguished from the law of nations.

Pand. tit.
De Muner.
et Hon.
et Ut.
Gradatim;
et vid.
Brisson,
Vocab.
Jur.

Thus in the treatises *De Statutis* are to be found the principles of the law of nations respecting conflicts between the laws of different countries. The word *statutum* is not to be found in the *Corpus Juris Justinianei*, but its place is supplied by the term *Lex Municipalis*. (g) But in the posterior law, which the civilians call

(f) Voet, ad Pand. tit. De Statut.; and Story, on the Conflict of Laws, ch. i. § 12.

(g) It is to be understood that the word *statutum* is not to be found in the Corp. Jur. Justinianei used in the sense afterwards attached it; for in a law of the Jurisconsult Ulpian, in the Pandects, he makes use of the expression *imperialia statuta*. In the same law, that which in after-times was called *statutum* is denominated by Ulpian *lex municipalis*. Pand. tit. De Sepulcr. Viol. l. 3. § 5.; adde Pand. tit. De Verb. Signif. l. 46. pr.; et vid. l. 135. ff. tit. De Verb. Signif.

jus novum the word statutum frequently occurs, as also in the canon law ; and many of the old civil law doctors wrote treatises “ de statutis,” which are remarkable for their profound erudition in imperial jurisprudence. (*h*)

in verb.
Lex.
Immo vid.
Alb. de
Rosat.
Tract. de
Stat. in
princ.

It is highly probable that the very word Statute was introduced into our jurisprudence by the civilians ; for in the Saxon law there is no trace of such a legal term, and the name of statute seems to have been unused in our law until after *Vacarius* had taught the imperial law in England. It should also be observed that it was principally under Edw. I. that acts of parliament were emphatically called statutes ; thus we have the Statutes of Westminster, the Statute of Winton, the Statute of Acton Burnel, and many others. It is also remarkable that the statutes of that period were named and cited in a manner similar to the method of the civilians ; thus, we have the statute *Quia emptores terrarum* and *Circumspecte agatis* distinguished and cited by their initial words, and the statute *De donis conditionalibus*, and many others, named in the same manner as the titles of the Code and Pandects. Now, it has never been sufficiently

(*h*) Albericus de Rosata, Bartolus de Saxoferrato, Gio. Natta, Baldus Perusinus, Albericus Brunus, Johannes Campeggius, Laurus de Palatiis, Lancelotus, Roccus Curtius, Petrus Ravennæ, Lanfrancus de Oranio. Vid. Fenzonii Annot. ad Stat. Rom. Urb. in Præfat. et Tractatus Universi Juris, tom. ii. See also Voet, ad Pand. l. i. tit. iv. pars ii. De Statutis ; et Paulus Voet, Tract. De Statutis ; also Boullenois, Traité des Statuts.

Tiraboschi,
Storia della
Letter. Ital.

Cujac.
Observ.
lib. xii.
cap. xvi.

observed that the English Justinian was a cultivator and admirer of the civil law. It is related by Tiraboschi, who cites Pancirolus and Padre Sarti, that Edward I. being in Italy in the year 1273, on his way from the Holy Land, heard the lectures of Francis Accursius, the son of that great glossator whom Cujacius designates as Optimus Accursius, and of whom, as well as of his son Francis, Gravina writes in such high terms of eulogium, and that the king was so struck with admiration at the powerful juridical talents and the profound erudition of the illustrious professor, that he made him his councillor, induced him to resort to the English court, and twice intrusted him with important foreign missions. Accursius resided eight years at the English court, but Italy would not remain without him longer, and he was (i) recalled among his fellow citizens, loaded with presents and pensions. Arthur Duck confirms this story; he cites a charter in which the king designates Accursius as *dilectum et fidelem secretarium nostrum*, and another, in which Accursius is called *legum doctor et illustris Regis Angliæ consiliarius*. The esteem in which Edward I. held Accursius serves

(i) Vid. Panzirol. De Clar. Leg. Interp. l. ii. cap. xxix. Selden (Dissert. ad Flet. b. 8.) doubts whether Accursius ever did in fact reside in England, but his doubts rest on very slight grounds. The writ existing among the records directed to the sheriff of Oxfordshire, commanding him to provide lodgings for the Doctor of Laws, Accursius, and his family, at the king's charges, sufficiently refutes these doubts.

to confirm the character given of that great sovereign by Lord Chief Justice Herle, who pronounced that *Fuit le plus sage Roy que unques fuit*. It may well be argued upon these data that the civil law, which was then shining forth in all its glory in Italy, had a greater and more direct influence upon the formation of our jurisprudence under the English Justinian than is commonly supposed; we may therefore consider it not an improbable hypothesis that the term statute which became so much in use in the reign of Edward I., and the distinction between common law and statute law, may have been derived from the *statuta*, *jus communis*, and *jus statutarium* of the civilians. This hypothesis would give us a key to the derivation and original meaning of the term *common* law in our jurisprudence more satisfactory than that which is to be found in Lord Hale's history. But there is no doubt that the *statutes* of the universities and of some other corporations were devised upon the model of the *statuta* of the civil law professors.

It is also clear that the term *municipal law* in our modern jurisprudence is derived from the same source, for the law peculiar to each country (in the words of Gajus, *quod quisque populus ipse sibi jus constituit*) bears to general natural law or universal law (*commune omnium hominum jus*) a relation analogous to that which the laws of the *municipia*, enacted under and by

Coke,
2d Inst.
156.

Pand. tit.
De Just.
et Jur. l. 3.

virtue of their municipal constitutions, bore to the general law of the empire or *jus civile*.

Vid. Bris-
son, Vocab.
Jur. verb.
Munici-
pale.

But, taking the word in its proper sense, as *quidquid ad municipium pertinet*, we may easily attach a definite meaning to the word *municipal corporation*, about which some dispute took place in England, when in 1835 a commission was issued to examine into the state of *municipal corporations*. Under that legal denomination must be included not only the governing body or *ordo* of the towns, but the *corpora civitatis*, or those corporate bodies which are *membra urbis vel civit.* under which denominations the trades, or *corpora opificum et negotiatorum* were included by the civil law. They were component parts of the municipal community as such, and were composed of certain classes or orders of *municipes*.

Brisson,
Voc. Jur.
in verb.
Corporati,
et ibi cit.

The warm admiration and zeal with which the classical jurisprudence was cultivated, by multiplying comments and glosses, also contributed to render jurisprudence intricate and unmanageable. This exuberance of cultivation was in some degree corrected by the gloss of Accursius, by whom the glosses and comments of his predecessors were consolidated into one gloss, with large and important additions of his own; but it was not until the Cujacian school, under the auspices of Alciatus, and afterwards under those of the great Cujacius, that the *erudita jurisprudentia* became fully established and developed, which,

by superseding the former schools, so vastly facilitated the researches of the civilian for practical purposes.

It was that school that finally got rid of the too great subtilty of the early civilians, and the multiplicity of arbitrary distinctions, which had no effect for the furtherance of justice, but merely increased litigation and diverted their minds from the pursuit of real science. Thus, they curiously discussed whether instruments must be written on certain substances, whether a person having certain bodily deficiencies could be a notary, whether a deed without the usual commencement, *In nomine Domini Amen*, was valid, and many other similar questions. This chicanery gave occasion for an amusing story of Sacchetti (Novel. cxxvii.), a writer of the fourteenth century. Messer Rinaldello da Meza being a stranger in Florence, and seeing in the public square before the palace a great crowd of citizens accompanying a long procession of personages in robes garnished with miniver, asked who they were, and being told that they were judges and doctors of law, he began counting them with the greatest consternation, and exclaimed that he wondered how one stone remained upon another in the whole city. On being asked the reason of his exclamation, he said that in his country every thing went on prosperously until a rich citizen sent his son to study law at Bologna, who, on his return, set

every man at variance with his neighbours, and entirely subverted justice with his technicalities and niceties, so that the town was a perfect Babel. How, then, is it possible, said he, that, when one of these people ruined my native town, Florence, where there are such a number, can escape total destruction and subversion! The Florentines hearing this, confessed that the judges and lawyers almost drove them mad.

Heineccius, in his preface to Vinnius ad Instituta, gives an interesting sketch of the imperfect state of the civil law during the middle ages, when ingenuity, talent, and application were but too frequently devoted to the invention and discussion of arbitrary distinctions, and to starting frivolous or useless doubts, instead of being exclusively exerted in the attainment of justice and certainty by working out the results of the true reasons and grounds of the law. The strictures upon the schools of law by Bodinus, and those of the ecclesiastical writers of the middle ages, who feared that the study of the law would supersede that of theology, are well known.

It is easily to be conceived that the multiplication of municipal or local statutes, added to the number and jarring opinions of the interpreters of the law, must have produced very serious inconveniences.

Not only cities, but even small towns, which in those times were defended by ramparts, and *castella*, or villages surrounding a castle and towers,

though they had no distinct municipal constitutions, had their statuta or municipal laws. In many parts of Italy there are still to be seen remains of what the writers of the middle ages called *oppida* and *castella*. There are little towns, composed, in some instances, of not more than forty or fifty houses, and which in former days were perhaps smaller, the form of which is that of great and strong places. A citadel stands upon the highest part of the ground, enclosed by walls with towers, battlements, and turrets, and if near the sea, the town has frequently a mole and little port, with their defences ; these were the *oppida* of the middle ages. Then, nothing is more common than to see a keep or dongeon placed upon the top of an eminence, a mountain, or a cliff, surrounded with its sometimes double-turreted and embattled rampart, and a heap of houses seeming to crouch for protection as well around the fortress as between the ramparts and the keep or dongeon ; such are the characteristics of the *castella* of the middle ages. The insecurity which these appearances bespeak, the difficulties of communication, and the imperfect means of general government from the cities, must have rendered it necessary that these small places should take measures for selfgovernment by municipal legislation. This was probably done very frequently by general assemblies of the whole population. In all the writings of the civilians of the middle ages there are traces of this primitive republican method of legislation.

Vid. Savigni, His. Dr. Rom. vol. i. ch. ii. § 1.

Fenzonius, ad Stat. Urb. Rom. et ibi cit.

Lopez
Gloss. ad
Siete Par-
tidas, par. i.
tit. i. l. xii.

Fred. ii⁴¹.
Imp.
Const.
tit. i. § 1.

The statutes were in some cases decreed by the *potestas* or other magistrate. The great variety of the modes by which statutes were enacted is to be seen in the text of the constitutions of the Emperor Frederic II.: *Statuta quæ civitates, vel loca, potestates, consules, vel quæcumque aliæ personæ, &c. ;* and again, *Potestates vero, consules, rectores, statutarii, et scriptores dictorum statutorum*. These words include not only the cities which had municipal constitutions, but the *castella, oppida, and loca* which were ruled by the assemblies of the people, by magistrates sent by the superior government or elected by themselves, by their bishops, or by their lord or tyrant. Their modes of government frequently varied, and the history of one of those little places, if it were known in all its details, might frequently prove as complex and eventful, on a small scale, as that of a great and powerful community.

Muratori shows, by a variety of historical documents, in his forty-sixth dissertation, that the most antient form of government of the free cities was that of elective magistrates with the title of consuls, to whom in general very extensive powers were entrusted. Their numbers varied greatly, and at Lucca there were as many as sixty ; indeed, all the superior magistrates in many cities were called consuls, and while a small number entitled *consoli maggiori*, or, as at Genoa, *consoli del comune*, governed the state, the remainder devoted themselves to the admi-

nistration of justice and to the other departments of the government.

The constant recurrence of elections of consuls, who frequently, as at Genoa, remained in office but one year, and the want of unity in their government producing intolerable dissensions, a change began to take place before the year M.CLXXX., and the supreme power of government was generally entrusted for a longer term to a single magistrate, entitled *podesta* or *prætor*, who was always a foreigner. Consuls, however, were not discontinued, but still held the high and other offices of the public administration under the government of the *podesta*, and there are even instances of the *consoli maggiori* coexisting with the *podesta*. Such are the principal variations which the constitutions of the free cities and municipal communities of Italy underwent as regards their magistrates.

The degree of dependence of the civitates, castella, oppida, and loca on each other or on other powers was extremely various, and their power of enacting statutes must therefore have varied greatly in its extent, as it was a principle among the (*l*) civilians that all statutes are enacted *salvo jure superioris*.

(*m*) Even after the peace of Constance, the municipal statutes of Italy for some time con-

(*l*) Vid. Pand. tit. De Leg. Rhod. l. 9. et D. D. ad h. leg. Pand. tit. De Sepulcr. Viol. l. 3. § 5.

(*m*) Murator. Antiqu. Ital. Diss. xxii.

sisted only in such decrees of the *potestates* or of the republics as were required for the government of the people and the administration of public affairs. They very rarely changed any thing in the *jus commune*, but they soon made numerous alterations in the common law both in criminal and civil matters. As statutes became more frequently enacted, they also were more carefully and skilfully drawn up. (*n*) This was in most cases probably done by notaries, who were perhaps the persons designated by the

(*n*) In the proemium to the *statuta* of Florence, we find these words: "Fuit ergo utile et necessarium reipub. ne ulterius in incerto laberetur, tantam multitudinem legum amputare sub vigili cura et assidua sollicitudine acris et magnæ gravitatis virorum officialium Montis egregios et famosos jur. utr. doct. in hac alma urbe legentes infrascriptos, coadjuvantibus et operantibus prudentissimis et expertis procuratoribus et notariis infrascriptis"

One of the two d. utr. jur. whose names are inscribed at the foot of the proemium is the celebrated Paulus Castrensis, or De Castro, who was a great compiler of statutes. He was a disciple of Baldus, and is remarkable for the clearness and soundness of his decisions and doctrines. Thus Alciatus says:—

"Non negligenda maxime est tyronibus
Castrensis explanatio."

He was vicar-general and assessor of the celebrated Cardinal Zabarella, Archbishop of Florence, commonly cited by the canonists under the title of *Cardinalis*. Castrensis taught at Florence, Siena, Bologna, and Padua, in which latter city he died at a great age in the year M.CCCCXX. Cujacius says, "Qui non habet Paulum Castrensem, tunicam vendat et emat." Terasson, Hist.; Gravin. De O. et Pro. Jur. cap. clxvi.

Emperor Frederick II. by the words (o) *statutarii et scriptores statutorum*.

Const.
F. II. Imp.
tit. i. § 1.

Thus, in the chronicle of Bologna by Padre Cherubino Ghirardacci, it is related that the people of Bologna, A. D. 1285, elected, to reform and remodel their statutes, two men learned in the law and four notaries; and the employment of such persons who were learned in formulæ and in the preparation of legal instruments must have contributed much towards improving the style of legislation.

Ghirard.
Stor. di
Bologna,
p. 101.

Vid. Savigni, Hist.
du Dr.
Rom. vol. i.
pp. 44. 285.
370.

As the statutes of the cities and places increased in number and importance it became usual to compile them into a single body of law, which was called the *statutum* or statute, and it is highly probable that these compilations were undertaken after the example of the Code of Justinian, with which the compilers of the Italian statutes were most conversant.

The antiquity of some of these compilations is very great. The *statutum civitatis Ferrariæ* was drawn up before the year M.CCVII; that of Venice is as ancient as M.CCXLII. The antiquaries of Pistoja assert that the *statuta civitatis Pistoïensis* were compiled in M.CXII., but Muratori shows that they are not so ancient, and, indeed, a doubt is cast on the date of the compilation by Uberto Benvoglianti, the learned and judicious annotator of those statutes.

Murator.
Antiqu.
Ital.
Diss. xxii.

(o) But as for *statutarii*, vid. Ducange, Gloss. in verb. *Statutarii*.

Tiraboschi,
Storia,
vol. iv.
p. 393.

Gravina,
De Ort.
et Progr.
Jur. Civ.
cap. cxli.

Tiraboschi,
Storia,
vol. iv.

The first compilation of the statutes of Genoa was accomplished by Jacopus Balduinus, who was podesta of that city in the year M.CXXIX. and one of the scholars of the celebrated *Azo*, the author of the *Summa*. His fame is said to have drawn to his school at Bologna ten thousand scholars (*p*), but Balduinus was not worthy of his master, except in legal acquirements. He is said to have been expelled from Genoa by the patricians for condemning a noble to death contrary to the law of the republic. The statutes of Milan date from the year M.CCXVI.; those of the other Lombard cities and towns are anterior to the year M.CCXXXIII. The small places followed the example of the cities, so that by the end of the twelfth century not only all

(*p*) *Azo* is too celebrated a person to be passed over with mere mention of his name. He was a native of Bologna, and first taught in that learned city. His enemies forcing him to leave his country, he was entrusted with the chair of law at Montpellier; but the students flocked from Italy in such numbers to hear him, that the Bolognese were obliged to recal him. His death, which took place about the year 1200, was much regretted, and he received great honours. A strange legend has been related by Alciatus, which would prove him to have been rather a formidable disputant. It is said that he was once so exasperated at being overcome in argument by Martinus Gosia of Cremona, the pupil of Irnerius, at the time when that doctor was the rival of Bulgarus in the school of Bologna, that he knocked him on the head and killed him with the keys of the schools. This story of Alciatus is, however, considered fabulous. The works of *Azo* are his *Summa*, and a book of *Bocards* or *Maxims of Law*, besides *Glosses on the Digest and Code*. (Terrasson, *Hist. de la Jur. Rom.* p. 407.)

the cities, but the *terræ*, *borghi*, and *castelli* had their corpus statutorum or *statuta*. Some of these *statuta*, however, were drawn up as late as the fourteenth century, and all were several times reformed. The compilation of the statutes is indeed usually called *riforma*, a word which is in frequent use in the Jus Canonicum Regulare, in which the remodelling and altering the rule of a monastic order is called a *riforma*.

In the twelfth century sprung up a very extraordinary person, whose career had so powerful an influence on the Italian statutes that some account of him cannot without impropriety be here omitted. He was a greater *riformatore* of the statutes than ever lived before or after. Fra Giovanni da Vicenza was born at Bologna in the year M.CCXXXIII. of the noble family of the Schii. At a time when Italy was worn out with internal war, and men's passions were excited by party strife and ambition, he availed himself of the strong religious feelings of the times, and brought his eloquence, his genius, and the reverence paid to his order, into the field against the arms of the contending parties. He preached at Bologna, exhorting the people to peace and order, and the credulity of his hearers soon attached the supernatural honours of saintship to a man conspicuous from his birth, venerable from his order and ascetic life, and powerful by his genius; the truth and beauty of whose exhortations were rendered the more striking by the daily spectacle of the sufferings and crimes springing from the

Vid. Tiraboschi,
vol. iv.

violation of the precepts of peace and duty which he inculcated. Fra Giovanni did not hesitate to encourage the superstitious reverence of his fellow citizens by feigned miracles ; which are attested as genuine by such evidence, that Tiraboschi, with more modesty than judgment, declines to decide whether he was a saint or an impostor.

Such a person at such a time could not fail to obtain political power as well as reputation and respect. Fra Giovanni accordingly soon reigned paramount in Bologna, where he re-established peace among his fellow citizens, after which he reformed the statutes of the republic.

Having done this he undertook the arduous task of settling the differences among the cities of the Marca, Trevigiana, and Lombardy, which had so long been an apparently inextinguishable source of bloodshed and desolation. In those times, as any thing could be accomplished by a saint and an orator, Fra Giovanni succeeded in his endeavours.

If he had been satisfied with these results of his labours he might have been deservedly numbered among the benefactors of mankind, but ambition, which had perhaps been a prime mover in his conduct, now led him on to his downfall, and tarnished his honours.

In his progress from town to town he was everywhere received in triumph as a patriot and a saint. The magistrates and the people came forth with the greatest solemnity, their banner

mounted upon the carroccio or car drawn by oxen, and attended by all the array of their nobles and chivalry; the clergy everywhere greeted their eloquent and saintly brother with veneration and pride; in each town Fra Giovanni was invested with the powers of a Solon or a Lycurgus. Thus he reformed the statutes of Padua, Feltro, Treviso, Belluno, Vicenza, Verona, Mantua, and Brescia.

So much power could not long remain unenvied and unattacked.

The miraculous powers of Fra Giovanni were impeached, his actions attributed rather to personal ambition than to patriotism or religious zeal, and his power became obnoxious as soon as it ceased to be beneficial and necessary.

The Paduans first conspired against the authority of the pacificator, and instigated the people of Vicenza to throw off his bonds. Fra Giovanni did not wait to be attacked at Bologna, but, with a spirit and presence of mind worthy of his genius, flew to Vicenza. His sudden appearance, his eloquent appeals to the people, the sanctity of his character, the remembrance of his services, and the magnanimous boldness of his rushing among his enemies, disconcerted the party who had resolved his downfall; he was received with acclamations, imprisoned the podesta, made himself master of the city, and would have regained all his power, had not the Paduans attacked and made him prisoner.

From this time dates the decline of his in-

fluence. The Pope Gregory IX., the celebrated compiler of the Decretals, interceded for him, and procured his release. He returned to Bologna, but the charm was broken; his ambition, selfishness, and hypocrisy had been exposed by his enemies, and men had had time to scrutinize during his adversity his actions which had appeared bright and spotless to their eyes while dazzled by the splendour of his prosperity and greatness. Soon after the re-appearance of Fra Giovanni da Vicenza he retired into obscurity, and his name never after appears in the history of Italy.

Fra Giovanni was not the first compiler of the statutes of his native city, for we have in the chronicle of Bologna, of Padre Cherubino Ghirardacci, an account of the compilation of the *statuto* of that city, which may probably interest the reader sufficiently to justify its insertion at full length in this essay.

P. Cher.
Ghirard.
Stor. di
Bologn.
p. 161.

(q) “ In these times (A.D. M.CLXXXVII.) the records of the chamber were so dispersed in divers places and in such a confused state that it was difficult to get at the things that were wanted; and for this reason the council of the antients and the consuls of the people of Bologna decreed that two men learned in the law should be elected, together with four notaries,

(q) Similar reasons are given for the reformation and compilation of the statutes of Florence in the proemium of the voluminous legislative work entitled, *Statuta Populi et communis Florentiæ*.

sufficiently qualified, and not under thirty years of age, to whom should be given full power to compile those records in the proper manner, and to write all those things that might be necessary. These persons all together compiled, declared, abbreviated, and amended the statutes, ordinances, and reformations of the community of Bologna."

The same writer informs us that the statutes of the trades were in a similar manner compiled and reformed in the year 1360.

P. Cher.
Ghirard.
Stor. di
Bologn.
p. 353.

To pursue the history of the municipal statutes any further would be to undertake a history of the Italian republics, for which I must refer the reader to Sismondi and Hallam; but it may be here sufficient to observe that in most of those republics democracy, oligarchy, and tyranny succeeded each other alternately. In the fourteenth and fifteenth centuries the two latter preponderated greatly throughout Italy. The government of a single lord, usually a successful party leader or adventurer, was, however, very prevalent at a much earlier period, for Dante (*Purg.* l. 6.) says,

Che le città d'Italia tutte piene
Son di tiranni, e un Marcel diventa
Ogni villan che parteggiando viene.

Such sovereignties, however, were at that time seldom of long duration.

Under oligarchical tyranny and the government of corruption and private intrigue, the law must necessarily have dwindled into comparative

insignificance, and its power was annihilated by the will of the petty despots which usurped its place in almost every city of Italy during the fourteenth and fifteenth centuries.

We accordingly find that the legal science emigrated from Italy to France, where it found a refuge among the advocates and magistrates of those illustrious tribunals which alone kept alive the spirit of freedom, justice, and virtue in the midst of slavery, oppression, and corruption.

Of the change which took place in Italy when the comparatively learned and wise free republics were superseded by the cruel, and often ignorant, chiefs of factions, we have an instance drawn in lively and picturesque colours by James Malvezzi in his history of Brescia, written in the commencement of the fifteenth century. Speaking of the *Palagio della Ragione*, built by the Brescians in M.CCXXIII., he says, "The citizens therefore raised this palace, and added to it a tower of very excellent workmanship. There were placed the seats of the consuls and judges, in order that justice might be administered in one place to all the people of Brescia. The city was then so populous that when at the stated times they resorted to the palace that spacious court seemed too narrow for the multitude, and the place not sufficiently capacious. You would there have seen, besides the popular multitude, many valiant and illustrious citizens, and squadrons of knights upon their well caparisoned and armed horses, and attended by

their esquires. You would have thought you saw an image of Roman greatness. The venerable college of the jurisconsults seemed like an Athenian lyceum. In the midst of those honourable citizens and that numerous popular assembly, eight consuls and two other *consoli maggiori*, the rulers of the republic, sat upon high tribunals, besides the other magistrates, who in divers modes applied themselves to the discharge of the duties either of justice or of public service. The palace was thronged in every place. What more? It was like the senate and people of Rome." Here the patriotic chronicler breaks off, and feelingly laments the fall of so popular a form of government. "Where is now that great college of venerable jurisconsults? Where are those grave and honourable citizens? Where are those most just rulers? Where those good consuls? A single man fills the place of so many magistrates and citizens."

(*r*) Canciani mentions a reason which brought about the formation of *corpora statutorum*, which is important and interesting.

The consuetudines of the cities were in a great part unwritten, and it was necessary to prove what the law was in each case, from whence arose difficulty and want of stability in the law which could not be referred to any fixed standard.

(*s*) Giannone further elucidates the opinion

(*r*) Canciani, *Leges Barbar.* vol. v. p. 13.

(*s*) Giannone, *Stor. Civ. Nap.* l. xxi. cap. ult. in pr.

of Canciani, that this difficulty of proving the law gave rise in a great degree to the compilation of the municipal statutes, by informing us that the unwritten law or custom of Naples was proved in every case by witnesses, and that it was consequently so uncertain and doubtful that Charles II. found it necessary to order the unwritten usages of Naples to be converted into written statutory law.

This proof of custom by witnesses is what was called trial *per turbas*, or *par tourbes*, which prevailed in that portion of France which was called *pays coutumier*, as contradistinguished from the *pays de droit écrit*, until the *coutumes* were reduced to writing in the beginning of the thirteenth century. (†)

We have something resembling the trial of custom *per testes* in our legal history, for Edward I. called together a number of persons to ascertain what were the customs of Wales. Now, our common law would have occasioned the same difficulties which were felt so strongly according to Giannone and Canciani in Italy, if it had not been settled as a kind of established fiction that the judges are the sole depositaries and interpreters of the common law. But, on the other hand, if the system of following precedents had not been established, as much evil might have been the result of the enormous declaratory legislative power vested in the judges as the

(†) Dupin, *Hist. du Droit Français*, § xxii.

Italians could possibly have suffered from the fluctuations of their law.

This unwritten or customary law was not properly and strictly statutory law, though it became so by being compiled and in a manner re-enacted in a body. Properly speaking, statute law must necessarily be written or enacted law (*u*); yet there are instances in which *consuetudines* have been denominated *statuta*.

Having thus taken a general view of the history and nature of Italian statute law, we will proceed to the consideration of a few of the corpora statutorum by which the cities of Italy were formerly governed, and portions of which are yet observed where they are not contrary to the general law; and as Giannone has furnished us with curious particulars respecting some of the municipal statutes of the cities of the kingdom of Naples, we will commence with them.

King Charles II. of Anjou (*x*), to obviate the evils resulting from the uncertainty of the law peculiar to the city of Naples, ordered the archbishop of that see to call together twelve learned men, and to commence with them the task of reducing the Neapolitan usages to writing, and compiling them into a body. The archbishop was Philip Minutolo, a prelate well qualified for the performance of the important duty entrusted to him, and who had already filled high and

(*u*) Alberic. de Rosat. De Stat. l. i. quest. 1.

(*x*) Giannone, Storia Civile, l. xxi. cap. ult. per tot.

responsible offices of state. The king also commanded the university of Naples to choose learned and honourable men to draw up within the compass of a single volume the most established customs of the city. This work was to be revised by the archbishop and the twelve learned men appointed by the king to assist him, and then presented to the king.

The book was accordingly presented by the archbishop and the twelve commissioners to the king in the name of all the citizens, and was by him referred to (*y*) Bartolomeo di Capua, then (*z*) prothonotary of the kingdom, and after undergoing his revision, was promulgated, to the exclusion of all other customs, in the year 1306. (*a*)

It is supposed by Giannone that this legislative undertaking must have been suggested by the recent compilation of the statutes of Bari, the capital of Apulia, which had been accomplished under Charles I., father of Charles II.

Bari, having long been under the dominion of the Longobards, was governed by their laws, but gradually obtained peculiar customs, which, however, for the most part agreed with their common law. Those customs, which had previously been compiled by the citizens, and con-

(*y*) Vid. Gravina de Ort. et Progr. Jur. Civ. cap. clviii.; Panzirol. De Clar. Leg. Interpr. l. ii. cap. xlviii.

(*z*) With respect to the office of prothonotary of the kingdom, see Giannone, l. xi. cap. v. § vi.; see Cod. Theodos. Gothofred. vol. ii. pp. 87, 88.

(*a*) For further details, see Jul. Cæsaris Capacii Histor. et Antiqu. Neapol.; Grævii Thesaur. Antiqu. Ital. tom. ix.

firmed by Roger I. king of Sicily, were reformed under Charles I. with remarkable brevity and eloquence by two distinguished natives of Bari. They were the judge *Andrea di Bari*, and the judge *Sparro* or *Sparrone*, who was one of the greatest jurisconsults of his time, and was raised by his learning and talents to the highest offices and honours. Those learned persons did not, however, labour together, but each drew up one of the two books of customs, following a different method one from the other. The judge Andrea, as far as possible, moulded his work upon the Code of Justinian, and in part upon the Pandects. Thus, he commences, after a proemium like that of the Code, with a title *De sacrosanctis ecclesiis*, in which he treats of the law regarding the cathedral church and that of St. Nicholas of Bari, and finishes his compilation with a title *De regulis juris*, similar to that in the Pandects and Decretals.

The judge Sparrone, who with equal elegance added a second book to the compilation of Andrea, followed the method of the Longobard laws, commencing with a title on crimes, probably because the customs of Bari were in great part founded on those laws, and because that method had been followed by the first compilers.

The style of the Neapolitan *statuto* is less elegant than that of the *consuetudines* of Bari, but for that want of polish Bartolomeo of Capua furnishes an excuse by alleging that his object

was to express the sense of the law in terms most familiar to the people.

Naples never felt the yoke of the barbarians, but having originally been a Grecian city its customs are derived from the Grecian law. That capital was a city confederated with Rome (b) in the days of Cicero, and paying a tribute to the Romans enjoyed freedom under its own laws and magistrates, being governed by its arkontes and demarkoi, in the same manner as Athens. (c)

Bartolomeo di Capua, however, did not follow the method of the Greco-Roman law, but adopted an arrangement peculiar to himself, in revising and re-arranging the customs of Naples. Thus, he first treats of successions *ab intestato* and *ex testamento*, and then of contracts, but it is difficult to discover the principle of the details of his arrangement, which is a sufficient ground to question its propriety. (d)

The reader will find in Giannone the names and some account of the glossators and commentators on the consuetudines of Naples, the most distinguished among whom were *Napodano Sebastiano*, who died of the plague described by Boccaccio in the commencement of his De-

(b) Giannone, l. i. cap. iv. § ult.

(c) Ibid. l. i. cap. iv. § 1.

(d) The consuetudines Neapoli are dated as follows: *Data Neapoli per manus ejusdem Bartolomei de Capua, logothetæ et prothonotarii regni Siciliae*, A.D. 1306, die 20 Martii, 4 indict. regnor. nostror. anno 22.

camerone, and the more generally known *Matteo d'Afflitto*. (e)

It is remarkable that Napodano composed his commentary before the period of forty-four years had elapsed since the compilation of the laws by Bartolomeo da Capua, and that he was succeeded by no less than fifty illustrators, commentators, annotators, and other writers on the text of the law or on former comments.

This multitude of writers must undoubtedly have contributed powerfully to enrich the Neapolitan jurisprudence, but we see in Giannone that the civilians of Naples fell into the dangerous error of allowing their reverence for a great writer to induce them to look upon his opinions in the light of laws. That error, which long prevailed in many countries, among the civilians, is now almost universally reprobated throughout Europe, and commentators are now followed as having authority, not *ratione imperii*, but *rationis imperio*. In the kingdom of Naples the authority of the doctors or interpreters of the Pandects and Code was expressly abrogated by law, and there is a chapter in the well known work of Filangieri in justification of that measure. (f)

(e) Panzirol. De Clar. Leg. Interpr. l. ii. cap. cviii.; Terrasson, Hist de la Jur. Rom. p. 422.

(f) The adherence to the opinions of writers is not unknown to our law, for we are told by Lord Coke, in the proemium to his celebrated commentary, that in a certain case (release to one of two joint disseisors) the judges *would not allow Littleton's opinion to be impeached*. But in our

The example of Bari and Naples was soon followed by the cities of Aversa, Capua, Gaeta, Amalfi, and Catanzaro, each of which formed compilations of consuetudines, which were commented upon by different jurisconsults, and they were followed by the other cities of the kingdom.

Though, as we have said, the Neapolitan statutes were compiled by Bartolomeo da Capua according to a method differing entirely from that of the imperial law, yet the Roman law is the foundation upon which they rest; and, indeed, the Roman law was the common law of the kingdom of Naples, so that from the time when the Longobard domination ceased their law preserved only a *customary* authority, and required proof to be admitted by the courts. (*g*)

It is remarkable that the statutes of Naples should contain so much legislation on matters of contract, which are so very fully provided for in the Roman law, and which is a mere repetition of that law; but this may be accounted for by calling to mind that when the kingdom was under the Longobard dominion, the antient Greek and Roman law of the city of Naples was merely customary law, and recognized as such, and only so far as it was recognized.

At Florence it was otherwise, for there the civil law prevailed *virtute imperii*, and the statu-

law that abuse of the authority of writers was never carried so far as it was by the civilians.

(*g*) Duck, De Us. et Auct. Jur. Civ. lib. ii. cap. 4. §§ vii. x.

tory law was merely supplementary to the imperial law. (*h*)

We accordingly find, that there is little in that voluminous work, the *Statuta Civitatis et Communis Florentiæ*, that does not come under the description of public law.

The statuta of Florence are arranged with a method which shows the hand of that most clear and judicious commentator Paulus Castrensis, by whom they were compiled, previous to their promulgation in the year M.CCCCXIV. They are divided into five books; the first three books treat of the administration of justice, and the remaining two relate to a multitude of details of government, police, and administration. The first book contains the law regulating the election of the persons concerned in the administration of justice (*i*), namely, the podesta (*k*) or supreme civil and criminal magistrate, the capitano del popolo (*l*), whose jurisdiction was equal to that of the podesta in extent, the *executor ordinamentorum justitiæ* (*m*), a magistrate of plebeian degree and limited ordinary jurisdiction, and the officers and servants belonging to those three magistrates or under their supervision. Every detail is regulated, from the mode of election, office, and oath of the magis-

(*h*) Duck, De Us. et Auth. Jur. Civ. lib. ii. cap. 3. § xx.

(*i*) De electione et officio forensium officialium.

(*k*) Stat. Civ. Flor. l. i. rub. iv.

(*l*) Stat. Civ. Flor. l. i. rub. xiii.

(*m*) Stat. Civ. Flor. lib. i. rub. xxiii.

trates, to the number and dress of their attendants, and the fees due from them to the *campanarii palatii*. In every instance the statute specifies that the person elected must be a true Guelf, and not dependant on any foreign prince or baron ; thereby implying a reproach against the Gibellines as deficient of national and Italian spirit. The mode of election was clearly oligarchical, namely, by means of two electors chosen by the whole signoria, or body of the magistrates; and the want of legal learning on the part of the three *rectores forensium* was remedied by the appointment of a certain number of learned doctors, who were to act as assessors to the judges. To secure the impartiality of the three *rectores* a very elaborate series of enactments are inserted, under the name of *deveto* or prohibition, by which all persons not answering to a certain description are excluded from eligibility.⁽ⁿ⁾ Thus no one is eligible that is not a foreigner, or who is a fellow countryman of either of his three colleagues, or who is of a city in which Florentines are not eligible to public trusts. It may be worth while to observe, that the employment of strangers in offices of trust, which was so prevalent a custom in Italy while the republics lasted, was not in truth a custom that indicated any want of national feeling, as it appears at first sight, for those strangers were Italians, and consequently of the same nation,

(n) Stat. Civ. Flor. l. i. rub. iii. De generali deveto officialium forensium civit. Florentiæ.

religion, habits, and language as those whom they were called upon to govern. But, on the other hand, it must of course have been difficult to procure men of high character and attainments to leave their native city for the sake of holding an office of small emolument and power among strangers, and thence must have sprung the degradation of the judicial character ; of which we have an amusing instance in Boccaccio (*o*), who relates a story of a gross joke practised upon a judge on the bench, which is curious as a picture of the forensic manners of the times. Not only the chief magistrates, but the judges who were to advise them as assessors, and even to exercise the supreme jurisdiction by delegation, were by law necessarily foreigners, and the podesta was bound to change his judges, assessors, and notaries every three months. (*p*) Such a system must have answered the purpose of preventing the foreign magistrates from acquiring influence in the city, but must have had a most prejudicial effect upon the administration of justice. Thus, we find that only two out of the four (*q*) judges of the podesta were necessarily doctors of laws, and we find in the antient Italian *novelle* that there was a class of judicial adventurers who went about from town to town hiring themselves as judges, and generally

(*o*) Decamer. giorn. viii. novel. v. Tre giovani traggon le brache ad un giudice, &c.

(*p*) Stat. Civ. Flor. l. i. rub. xi. De mutatione judicum notariorum D. potestatis.

(*q*) Stat. Civ. Flor. l. i. rub. iv.

reckoning more upon bribes than upon official emoluments to indemnify them for their trouble. It appears from the same tale of Boccaccio before referred to, that the podesta engaged judges and other officers by contract out of what was allowed to him by the signoria, and consequently frequently studied making a profitable arrangement, in preference to securing fit persons to hold the offices under him. To the same class belonged the *rotanti* or judges of the *rota*, who so corruptly administered the law at Genoa during the latter period of the history of that illustrious republic. The unsettled state of the Italian republics rendered the judicial office so insecure, and so subordinate to the overawing power of the chiefs of factions, that the great civilians naturally gave themselves up to teaching in the schools, where they were the chiefs of little republics, and were consulted by cities and princes, from whom they received magnificent gifts and high honours. They also frequently held offices under the church and the emperors, and were employed as ambassadors by the princes and cities, or as magistrates and umpires for the settlement of particular affairs. It is not impossible that the value of the imperial patronage, when compared with the fluctuating career of republican or oligarchical honours, may have had some effect in making the antient civilians lean towards the Gibelline party, in which their attainments and talents must have had far greater scope than amid the perpetual jar and struggle of party contests. But, however this may be, the

great civilians of Italy cultivated jurisprudence fully as much as a science, as they pursued it as a profession, and to that fact we owe their immortal works and the splendour of the modern civil law.

(*r*) The second book of the Florentine statutes relates to proceedings in civil causes, beginning with civil process, and ending with a chapter on appeals, followed by a provision to prevent defect of justice by reason of the power or rank of a defendant, and four rubrics,—two on inheritance of husbands and mothers, and two relating to the recovery of damages. (*s*) The third book relates to criminal proceedings and penal law. The two first chapters or rubrics chalk out the criminal jurisdiction of the *rectores*, and their judges, who represented them in the several quarters or districts of the city; the duties of the criminal magistrates and their officers are next set forth, together with the mode of carrying on criminal proceedings; and with the thirty-eighth rubric commences the enactment of the punishments affixed to particular crimes, among which of course heresy holds a conspicuous place. The chapter *de fraticellis* may excite a smile, in which it is recited that certain monks—*certi fraticelli*—were going about misleading the simple laymen with new ideas and opinions, and the magistrates are ordered to seize them, and confine them in the prison of the inquisitor. The next

(*r*) Stat. Civ. Flor. l. ii. De causis civilibus.

(*s*) Stat. Civ. Flor. l. iii. De causis criminalibus et pœnis nec non Ordinamenta justitiæ, et Tractatus de cessantibus; et fugitivis.

chapter imposes restrictions upon the assembling of certain societies called *Compagie dei battitori* or penitents, and orders that no one shall flagellate himself in the city unless with his face uncovered. Then follows a rubric prohibiting the clergy from bearing arms and mingling in violence and crime, or frequenting taverns and gaming houses, or engaging in secular pursuits. At the conclusion of the penal code, which is very long, commences the *tractatus ordinamentorum justitiæ*. The *ordinamenta justitiæ* are a special code regulating the duties of the *executor ordinamentorum justitiæ* in the exercise of his extraordinary jurisdiction, acting as a control over the captain of the people and podesta. (t) That jurisdiction he was to exercise together with eight citizens drawn by lot, and those nine persons were to scrutinize as censors, or, as the technical phrase says, *syndicare* (u) the officers

(t) Stat. Civ. Flor. l. i. rub. x. Quod executor debeat syndicare potestatem, capitaneum populi, et alios officiales communis Florentiæ.

(u) The duties of indicators, and the mode of conducting their censorial proceedings, form a very important and interesting branch of the old Italian civil law. The following doctors wrote treatises on that branch of public law:—Baldus Perusinus, Tract. de Sindicatu Officialium: Angelus de Peruso, De Sindicatu: Paris de Puteo de Neapoli, De Sindicatu omnium Officialium: Amodæus Justinus de Castello, De Sindicatu, cum Expositione Inquisitionis Generalis et Querelarum porrectarum contra Officiales, et eorum Defensiones: Cataldus de Boncompagnis de Visso, De Sindicatu: Augustinus Dulcetus Veronensis, De Sindicatu. These treatises are collected in the seventh volume of the Tractatus universi Juris. These is also some law on the

of the republic. The remainder of the *tractatus* consists in a penal code directed against the nobles or *magnati*, which had been imposed upon them by the successful democracy; and as the executor *ordinamentorum justitiæ* was necessarily a plebeian (*x*), he was of course not supine with regard to this portion of the ordinances, which it was his peculiar duty to enforce. The situation of the *magnati* was analogous to that of the Irish catholics under the full severity of the penal code (*y*); they were excluded from all share in the government, and were subjected to every possible disadvantage. Thus, it was made a punishment to be created a magnate, and that punishment was held sufficient for serious crimes. (*z*) On the other hand certain persons and families were declared *populari* or plebeians as a favour (*a*); thus, the family of Cavalcanti were created plebeians (*deliberatum fuit per consilia communis et populi Florent. quod essent populares et non magnates*), excepting Dominic lord of Cianpoli and his issue. It is remarkable that wherever a family is enfranchised it is always with the proviso *omnes et*

same subject in the comment of Baldus on the law *Observare, § proficisci*, in the title of the Pandects, *De Officio Proconsulis et Legati*.

(*x*) Stat. Civ. Flor. l. i. rub. xxii.

(*y*) Stat. Civ. Flor. l. i. Tract. ordin. just. passim.

(*z*) Stat. Civ. Flor. l. i. Tract. ordin. just. rub. xxiv. et seq.

(*a*) Stat. Civ. Flor. l. i. Tract. ordin. just. rub. xxxii. et seq.

singuli à quindecim annis supra; this was probably to keep a hold upon the rising generation. This portion of the Florentine statutes is exceedingly interesting, as affording an instance of the oppression and wrongs suffered by an aristocracy in the fangs of a democracy. Thus, the nobles were disabled from accusing, accusations against them were to be received in secret as well as openly, and they were disabled from appealing when condemned. To all these unfair disadvantages the nobles were exposed, as well as to many others, whenever they were opposed to a plebeian; and when you add to that their disqualification from all but the most insignificant offices (*b*), it must be admitted that a more grievous system of oppression could with difficulty be devised.

The tractatus ordinamentorum justitiæ is followed by a title regarding the proceedings against debtors flying from justice or absconding (*c*), and here ends the third book. It is rather curious that in one of the enactments against the unfortunate magnates, in which they are forbidden to go beyond the limits of their parish with armed guards for the celebration of marriages, funerals, or the taking the veil of a nun, or the ordination of a priest (*d*), those guards are called *masnadieri*, a word which in modern Italian signifies robbers. Now, a similar change

(*b*) Stat. Civ. Flor. l. i. Tract. ordin. just. rub. xciv.

(*c*) Stat. Civ. Flor. l. i. Tractatus de cessantibus et fugitivis.

(*d*) Stat. Civ. Flor. l. i. Tract. ordin. just. rub. xlvi.

in the application of a synonymous word is to be found in Latin, for in Plautus (Mil. Glorios. sc. 1. act. 1.) the word *latrones* is used to mean the body-guard of a king or prince.

The fourth book commences with the duties of certain subordinate officers of justice, connected with the public revenue, after which comes the law respecting the election and functions of the consuls or chief magistrates of the trades and arts (*e*), as well as the regulations to which those communities and their members were subject. The trades and arts were twenty-one in number, and comprehended all the citizens enjoying the full rights of citizenship. There is a very curious enumeration of them, as well as of the Florentine families of the two orders, in a poem called *Firenze*, containing an account of the city and republic, by a writer of the name of Pucci, a Florentine, who died A.D. 1373. There is one curious chapter regarding (*f*) servants and menials of every description, in which their dress is minutely regulated, and the greater part of that and the next chapter is devoted to miscellaneous matters regarding trades. Then follows a chapter respecting revenue, to which is appended a most vexatiously minute sumptuary law regarding the dress of women, which is the

(*e*) Stat. Civ. Flor. l. iv. Tractatus et materia consulum, artium, et mercatorum.

(*f*) Stat. Civ. Flor. l. iv. Ordinamenta de famulis et famulabus.

only portion of the *statuta* written in Italian. (*g*) The frequent mention of velvets, damasks, silks, embroideries, and jewellery shows that a great degree of luxury must have prevailed in female apparel. From these prohibitory regulations none were excepted but the wives of knights and doctors of civil and canon law. Women of other classes were forbidden to wear precious stones or jewellery, except silver ornaments of the weight of a pound, and a silver belt of the weight of fifteen ounces. They were also not to wear any embroidery except as a collar, nor any velvet, silk, or damask of more than one colour, or figured, or to wear more than one silk dress at one time, or any furs except round the neck or wrists, or any fringes of gold or silver except round the neck or wrists or in the head dress. The width of the gowns at the bottom, and of the sleeves, and every detail of female dress, is the subject of regulation in this singular law, which was enforced by penalties upon the women violating them as well as the tradesmen enabling them to do so. It is not, however, to be believed that the Florentine ladies had not sufficient power to render these enactments nugatory. Sacchetti (*novella cxxxvii.*) has an amusing story of the way in which, by ingenious evasions, they frustrated the endeavours of a learned magistrate to enforce the law. Next comes a sumptuary law regu-

(*g*) Stat. Civ. Flor. l. iv. De prohibitis ornamentis mulierum.

lating marriage celebrations and feasts, which is followed by a similar chapter touching funeral ceremonies, and another regulating baptisms. The fourth book is concluded with a number of special matters (*h*), including regulations for the speakers in the public assemblies of the people, by which they are enjoined not to address the assemblies upon any question not before them, not to interrupt others while speaking, not to use vituperative language, and to obey the presiding magistrate. There are two curious rubrics in that chapter; one forbids any one to propose that a guard and ambassadors should accompany a supreme magistrate who is leaving the city on going out of office, to do him honour. This law must have been highly necessary to ensure the impartiality of the magistrates, but was hardly sufficiently comprehensive. Sacchetti (novella cxcvi.) relates several ingenious decisions of a podesta of Florence, which, when he had to undergo his trial before the sindics on leaving office, were impeached as neither according to the law nor the statutes; but he defended himself with such success that the sindics declared him not only free from blame, but worthy of honour, and induced the *signoria*, with the consent of the councils, to present him with a penon and a shield in the name of the people of Florence. He adds that this was the first instance of such a compliment being paid to a magistrate of Florence, and laments the partial and corrupt

(*h*) Stat. Civ. Flor. Tract. et materia extraordinariorum.

manner in which such honours were bestowed in his own time, not to reward virtue, but for private reasons. Another law enacts, that whoever proposes that an army be raised should be compelled to serve in it himself. (*i*) The remainder of the tractatus extraordinamentorum regards agriculture and the prohibition of certain games, as well as a multitude of regulations of internal police.

(*k*) The fifth book, and last, contains the law respecting the government of Florence, and opens with a rubric *de legibus*, strikingly exemplifying the dependance of the agrarian districts upon the city, which is a distinctive feature of antient and modern Italy: *Urbem nostram Florentinam cum toto ejus territorio legibus nostris regi et gubernari decernimus, nisi et quatenus loca nostri territorii propriis militarent legibus, juribus, vel statutis, quæ tamen nostra auctoritate confecta, aut confirmata fuerint.* In these words and those which follow, the citizens of Florence decree law to Tuscany, as the citizens of Rome decreed plebiscita for the Roman state. In the second rubric Florence is divided into four quarters, to each of which armorial bearings are assigned. The mode of electing the three chief civil magistrates, namely, the two priori and the gonfaloniere della giustizia, is then regulated. They were elected by

(*i*) Stat. Civ. Flor. l. iv. Tract. et mater. extra. rub. ix., rub. x.

(*k*) Stat. Civ. Flor. l. v. Tract i. De tribus majoribus officiis civitatis Florentiæ, et aliis eorum membris cum scrutiniis et devetis.

ballot, and with a method calculated by its intricacy to render corruption difficult, but at the same time making the election by the people exceedingly indirect. The most remarkable feature in this procedure is that a first election determined what persons should be eligible to the offices, and these persons, from their names being put in a bag, were called *imbursati*. There are also numerous provisos to prevent the interest of any one family being felt in the election. Here, as well as in other parts of the statutes, the jealousy of a democracy is strongly visible.

The same forms of election and scrutiny are prescribed for the appointment of all the other officers and magistrates of the government, including the captains of Pistoja, Volterra, Vald'Arno, and Arezzo, the podesta of Sanminiato, and the magistrates of other cities and districts under the rule of the citizens of Florence. The elections were to take place every five years. (1) The three principal magistrates of Florence were called *domini* or *i signori*, or *la signoria*, and they were assisted in their functions by the *collegiæ*, composed of the priors, *gonfalonieri*, and consuls of the trades, twelve *boni viri*, and a number of other persons enumerated in the beginning of the fourth rubric. The remainder of the *tractatus de tribus major. offic. civ. Flor.* is taken up with minute enactments settling the powers and

(1) Stat. Civ. Flor. l. iv. rubr. de scrut. trium major. offic. et alior. et ejus form. in princip.

patronage of the signoria and colleges, even down to the appointment and regulation of the musicians who were to attend the signoria, and of the bellringers of the palazzo del comune. (*m*) The gonfaloniere della giustizia was the presiding and superior magistrate, and he, with the priori, was to reside in the palace. (*n*) We come next to the legislative power (*o*), namely, the councils of the people, who with the magistrates of the *signoria* and the *collegia* ruled the republic. These councils were two, one the council of the captain of the city of Florence, and the other the council of the podesta. To each of these the signori and colleges belonged, and the number of councillors was in the first-mentioned council 285, and in the second 190. The councillors were elected by ballot by the signori and the colleges, but their term of office was only four months, and the regulations as to eligibility insured a pretty equal distribution of those honours. The persons out of whom the councillors were to be taken were chosen by ballot, and their names were drawn by lot out of bags, to the number of eleven for each gonfalone of the trades or com-

(*m*) Stat. Civ. Flor. rubr. xl. Quod dom. possint eligere pifferos, et trombettarios, &c. Rubr. xli. Quod dom. possint eligere tubatores naccherinarum, &c. Rubr. xlii. Quod dom. priores possint eligere campanarios, &c.

(*n*) Stat. Civ. Flor. rubr. xliii. De offit. et auctor. vexillif. just.

(*o*) Stat. Civ. Flor. l. v. Tract. consiliorum communis et populi Florentiæ.

munities in the council of the podesta, and twelve in the council of the captain. To the council of the podesta sixteen nobles were added, namely, four for each quarter of the city. Lastly, a rotation was established, by enacting that every councillor must remain four months out of office before he could be re-elected, and the influence of families was restrained by the prohibition of near relations being elected together to sit in the same council. I do not find that the councils had any exclusive right of taxation, but it seems that the whole management of the revenue was in the hands of the signori and colleges, with the revenue and fiscal magistrates. (*p*) After a long series of rubrics regulating the proceedings of the councils and their officers, we come to the last chapter of the first tractatus of the fifth book, in which the persons ineligible to the offices are specified. (*q*) Thus, no Gibelline is to be eligible; no enfranchized noble is to be eligible within twenty years of his being made a plebeian, &c.

The next tractatus regulates the duties of the magistrates and public officers of the republic, regarding the internal economy of the city, and the watching, lighting, protection against fire, the university, the trades, the mint, &c. &c. After a chapter respecting the election of the

(*p*) Stat. Civ. Flor. l. v. rub. cxii., rub. cxiv., rub. cxv., et al. loc.

(*q*) Stat. Civ. Flor. l. v. De devetis offitiorum communis Florentiæ.

otto della custodia, whose duty it was to provide for the defence of the city, and to superintend that of the towns of the republic, a number of chapters follow respecting the duties and election of the magistrates, to whom was entrusted the same care in the different towns and fortresses. The next chapter continues the subject of the military part of the public law. It regards the government of the stipendiaries, who were at that time in the pay of every state in Italy. (r) The name of *offitiales conductæ* and *conducta* points out to us the derivation of the title of the celebrated *condottieri* from *conducere*, to hire. One rubric is particularly curious, in which a penalty is enacted for any one who should enlist pretending to be a Genoese crossbow-man when he was not a Genoese. (s) The Genoese crossbows were not less famous than the English longbows, and the smallness and barrenness of the Ligurian territories induced its energetic and enterprising inhabitants to engage as soldiers in foreign services, where their skill in the management of the crossbow made them valuable acquisitions.

The financial follows the military department. The chapter *de camerariis* treats of the treasurers of Florence and the management of the treasury, and is followed by the law respecting

(r) Stat. Civ. Flor. l. v. De officialibus conductæ.

(s) Stat. Civ. Flor. l. v. De off. cond. Rubr. De poen. illius qui fecerit se scrib. pro Januense balistario qui non erat.

the *censi* (*t*) or direct taxes, and the *gabella* (*u*) or tolls and excise.

The fourth and concluding tractatus of the fifth and last book is concerning the magistrates and government of the cities, towns, and provinces of the republic (*x*), beginning with Pisa. To pursue that subject into its details would lead to a too lengthened analysis for the limits of this essay; it is, therefore, sufficient to observe, that throughout this part of the statutes the utmost jealousy of the dependant cities and town is ever visible, and they certainly enjoyed little or no liberty under the rule of the Florentine republic. The body of statutes terminate with the attestations and signatures of the two doctors, Bartholomeus de Vulpis de Sonzino and Paulus de Castro, the compilers and reformers of the statutes, followed by those of the other commissioners. Then come their acceptance and confirmation as law by the magistrates and councils of the citizens, and some general rules of construction.

The style of the *statuta Florentinæ* is certainly unclassical, and it forms a contrast with the language of the works of Paulus de Castro and the proemium of the statutes themselves, which is not inelegant. We may conclude that the old lan-

(*t*) Stat. Civ. Flor. l. v. Tract. iii. De censibus, et seq.

(*u*) Stat. Civ. Flor. l. v. Tract. iii. Ordinamenta servandæ per offit. et gubern. gabellæ contract. et seq.

(*x*) Stat. Civ. Flor. l. v. Tract. iv. Offit. extrinsecorum.

guage of the statutes was preserved by the compilers. (y)

The statutes of Florence were commented upon by Asinius, a writer of high repute, who lived in the time of Cosmo de Medici. He was also author of a treatise *de executionibus* and other works. Arthur Duck mentions another commentator of the name of Magonius. (z)

An example having now been given of the statutes of a democratic republic, it may be fit not to conclude this essay without laying before the reader an account of the municipal laws of an aristocratic republic. We will therefore proceed to the examination of the *statuto* of Genoa.

Genoa was, like the other Italian republics, first governed by consuls, chosen among the citizens, and by them in their general assemblies. The Genoese chronicle of the eleventh century, drawn up by Caffarus, under the authority of the senate, contains the names of those antient magistrates prefixed to the history of the respective years during which they governed. Their numbers varied from four to six, and they were distinguished by their title of consoli del comune from the inferior consuls, who were elected annually by the citizens in each of the four *quartieri* or districts into which the city was

(y) With respect to the statutes of the other cities of Tuscany, and their commentators, see Arthur Duck, *De Us. et Author. Jur. Civ. lib. ii. cap. iii. § xxix.*

(z) Duck, *De Author. Jur. Civ. l. ii. cap. iii. § xxix.*

divided. To the former belonged the supreme government of the republic in peace and war, and to the latter the administration of civil justice, subject to an appeal to the superior consuls. In the thirteenth century a foreign podesta, with a council of eight, superseded the consoli del comune; the legislative and supreme deliberative power still resided in the popular assembly, and in the year 1339 Simon Boccanegra was elected the first doge of Genoa. (a)

(b) The most remarkable *reforma* of the statutes of that illustrious republic was undertaken in the year 1528, and carried into effect under the influence of Andrew Doria. By that constitution the names of Guelf and Ghibelline were proscribed, and no distinction was allowed among the citizens but that of nobles and citizens of the second class, or plebeians. To the nobles belonged the government and administration of the republic, except in certain offices which were reserved to the second order as paths to nobility, and as affording emolument, which the nobles uniformly disclaimed receiving.

All the noble families (except the proscribed Adorni and Fregosi, whose strife had so long disturbed the republic,) who kept six open houses in Genoa, were constituted nuclei under the name of alberghi, to which all the remainder of the nobility were aggregated. These alberghi

(a) Vid. Sismondi, l. i. p. 353. t. iii. p. 319.

(b) Bizari, S. P. Q. Gen. Histor. l. xx. p. 476; Varese, Storia di Genova, vol. v. p. 75, et seq.

were twenty-eight in number, five out of whom were new noble families; and care was taken in distributing the inferior families under their names to mingle Guelfs with Ghibellines, and partizans of the Adorni with those of the Fregosi, so as to break up the distinctions of party, under which all the nobility had so long been arrayed. (c) The aggregated or inferior families took the name of the albergo to which they belonged, without, however, renouncing their own proper name, and the whole nobility were registered in a book called the libro d'oro, which was in the custody of the eight procuratori of the republic. The exclusiveness of the aristocratic forms of government was qualified by a provision that the senate should be empowered to admit to the nobility seven citizens and three inhabitants of the litoral provinces in each year, provided they were among the most distinguished members of the second order.

(c) The twenty-eight families which are to this day held to be the élite of Genoese aristocracy were the following:—Doria, Calvi, Catanei, Centurioni, Cibo, Cicada, Fieschi, Franchi, Fornari, Gentili, Grimaldi, Grilli, Giustiniani, Imperiali, Interiani, Lercari, Lomellini, Marini, Negri, Negroni, Pallavicini, Pinelli, Promontorii, Spinola, Salvaghi, Sauli, Vivaldi, Usodimare. It is a curious fact that eight of these houses are extinct, namely, Calvi, Cibo, Cicada, Grilli, Interiano, Promontori, Salvaghi, and Usodimare; and two are on the point of becoming so, namely, Fieschi and Negri, or Di Negro. The illustrious house of Grimaldi is extinct at Genoa, and is now represented by an Englishman, Stacey Grimaldi, Esq., F. S. A. Thus, only sixteen of the twenty-eight alberghi remain at Genoa.

(d) Out of the whole nobility three hundred citizens were to be annually chosen by ballot, and they were to elect one hundred more. This body of four hundred was the *consiglio grande*, which was the great legislative and supreme council of the republic. The great council annually chose by ballot out of their own body one hundred nobles, who constituted the *consiglietto* or lesser council, with whom rested the decisions of matters of lesser importance and the election of the magistrates of the city. From and by the same great council were biennially elected by ballot eight magistrates, constituting the senate. Their duty was to administer justice, to decide on matters of lesser importance, to prepare more weighty matters for discussion and refer them to be debated in the two councils. The senate, together with the doge, also had a legislative power, except to increase their own authority, and their laws might be abrogated by the council. To the senators, as *procuratori della repubblica*, together with the ex-doges, who were *procuratori* for life, was committed the whole management of the financial department of the government, and five censors were entrusted with the power of calling the magistrates and officers of the republic to account, and of seeing that the laws were not suffered to fall into neglect. The doge was chosen, by a complicated combination of election and chance, by

(d) Vid. Varese, loc. cit., et Bizaro, Tract. De Stat. et Admin. Reipub. Gen.

the great council. The ingenuity of the procedure followed in the election of the doge renders it not uninteresting. The great council being assembled, presided by the *serenissimi collegi*, the councillors were seated on benches, each bench distinguished by a number. The names of the nobles seated on each bench were then separately written on sheets of paper by the under-secretaries of the senate and deposited on the throne. In the mean time the five conservators of the laws placed in an urn ten gilt balls, each bearing a letter of the alphabet. They then drew one of the balls out of the urn by lot, and that letter being known only to the conservators of the laws, they stamped it upon fifty golden balls, which they put into the urn in the place of the ten, and added as many silver balls as were necessary to make the number of balls equal to that of the councillors, without including the colleges, that is to say, the senators and procuratori. The urn was then placed on the throne, its mouth being only sufficiently large to admit the hand and wrist of a man. On the table before the throne were two balloting urns, in one of which were folded tickets marked with numbers corresponding with those on the benches, and in the other tickets in equal number to the former, but marked with the word *beginning* or *end*. First the number of a bench was drawn and then a ticket from the other urn was drawn, indicating, according to chance, the beginning or the end of the list of

the bench. The list before-mentioned was then opened which bore the same number as the bench on which the lot had fallen, and beginning either at the beginning or at the end, according as chance had decided, the names of the councillors were called over, and each councillor, as his name was called, approached the throne and drew a ball from the urn. If the ball extracted¹ was silver the councillor dropped it into a box and returned to his seat ; but if it was gilt he presented it to the secretary in waiting, who noted the letter printed on it. The *eccellentissimo decano*, or president of the senate, then rang a little bell, and the secretary proclaimed the name of the councillor who had drawn the gilt ball. The ball was then restored to the councillor who drew it, and by him carried to the conservators of the laws, who assured themselves of the identity of the ball by seeing whether the letter of the alphabet printed on it was the same as that which they had secretly stamped upon the fifty balls. The councillor was then conducted to a cabinet, where he wrote the name of the person whom he chose to nominate to be doge, on a ticket folded up, which he delivered to another secretary, to be by him deposited in an urn. The councillor was then locked up in a room, lest the letter on the gilt balls should be divulged. The same forms were followed with each of the fifty gilt balls as they were successively drawn ; but if the number of nominees did not reach twenty, the nominators were

to nominate again, in the same order of priority as before, until that number was completed. As soon as the fifty gilt balls had been drawn the secretary published the names of the twenty nominees, and they were submitted to the ballot by the whole great council and colleges, and fifteen elected out of the twenty by plurality of votes. On the next day the fifteen were reduced by ballot in the *minor consiglio* to six, for the election of whom a certain determined number of votes were requisite. If at the first sitting the number was not completed the consiglieretto sat again until the six were duly elected out of the fifteen; and as soon as the first four were chosen the great bell of the ducal palace was rung. On the day after their election the six were confined in a room under guard of the halbardiers of the palace, and six balloting boxes were placed before the throne, each marked with the name of one of the six; and the great council being assembled they elected the doge by ballot out of the six. The name of the new doge was then published before the great council, presided as before by two serene colleges sitting within the balustrade of the throne, and then announced by the secretary to the six nominees, in these words, *E stato eletto per doge della serenissima repubblica, il serenissimo—N. N.*

It is curious to see how little reliance the Genoese legislators placed on the ballot by itself. In this they are supported by the authority of the

Venetians (e); and tradition tells us that even this complicated system did not prevent corrupt practices on the part of the poor nobles, who were necessarily dependant on their fellow-citizens, and liable to corruption. It is, however, evident that corruption or undue influence could be of very little or no effect in the election, as the great majority of the electors were far above such motives, and as the number of steps in the process, even independant of chance, must have made the result very uncertain until the six were elected; and the probability was that they would be persons of the first consequence and consideration in the nobility, being chosen by a majority of the council.

The doge could do nothing without the senate, but he had a veto in the enactment of laws. His office lasted only two years, during which he was a prisoner in the palace, except when a decree of the colleges, that is to say, the senate and the procuratori, sanctioned his public appearance in all the pomp of royal majesty; and two senators, entitled *i dui di casa*, constantly resided with him as his guardians and advisers. In the new laws, promulgated in 1526, we find (cap. xlvii. De condendis legibus.) a change in the legislative power and the mode of exercising it. When the proposed law was at variance with the statutes of 1526, it could be enacted only by at least four fifths of the votes in the collegii, that is to say, the senate and

(e) Sir J. Harrington, Oceana, p. 113. vol. i. fol. edit.

procuratori, and the same proportion of votes in the consiglietto and in the consiglio grande ; but in other cases the mere majority in the colleges and the consiglietto might make laws.

The jurisdiction of the five censors was extremely curious, and deserves particular consideration. They were entitled the *supremi syndicatori*, and their duty somewhat resembled that of the Roman censors. Every magistrate, except the doge, senators, and procuratori, was subject to have his conduct scrutinized, and all complaints brought against him examined into by them, on his quitting office. The syndicators also had power to disqualify any noble who disgraced himself from voting for or sitting in the great council, or, of course, holding any other office ; and so important and dangerous a power was never entrusted to any but the most experienced and upright statesmen in the republic.

But the most important, perhaps, of the functions of the syndicators was that of keeping the different powers of the state within the bounds assigned to them by the law, by annulling their illegal acts. Even the doge and senate, or the doge and the two colleges, were not exempt from this jurisdiction. The syndicators sat in such cases in the hall of the ducal palace before the throne, and within the balustrade. When an act of the senate or colleges and the doge, who always presided over those assemblies, was to be quashed, the secretary of the senate (who was always a doctor of laws, and not noble, but became so on

leaving office,) was made responsible as legal adviser of their excellencies for the illegality in their proceedings, and the form ran thus: De-creverunt magnifici censores non licuisse magnifico secretario tale decretum rogare. There is a tradition that in the time of the doge Montaldo the doge and senate took the garden of a private man to build the walls of the town, but the supreme syndicators to whom he appealed quashed the decree. From the decision of the supreme syndicators there was no appeal. (*f*) The doge and senators and procuratori were liable, on their time of office expiring, to be proceeded against *ex officio* by the supreme syndicators before the consiglietto, in which assembly they in such cases presided, and the ex-doges, as perpetual procuratori, were always liable to a similar proceeding. (*g*) There were also ordinary syndicators who had a censureship over the magistrates of the second class (*h*), and from them there was an appeal to the supreme syndicators. Seven inquisitors of state watched over the safety and tranquillity of the republic, armed with formidable power, and five magistrates, entitled *conservatori delle leggi*, assisted at the deliberations of both the great and the lesser council,

(*f*) Stat. Civit. Reipub. Genuens. l. i. cap. ii. De supremis syndicatoribus.

(*g*) Hieronimi, De Marinis Genua.

(*h*) Stat. Civit. Reipub. Genuens. l. i. cap. iii. De syndic. ordinar.

to maintain the observance of the laws in those assemblies. (i)

The most dignified court of original jurisdiction was the *magistrato dei supremi*. (k) That assembly was composed of seven nobles, whose offices lasted only six months, and it was their duty to exercise the civil jurisdiction vested in the senate, particularly in the appointment of guardians and curators, and jurisdiction over them, to delegate the causes of personæ miserabiles that justice might be administered to them without expense, and to afford equitable relief in a multitude of cases. The *magistrato dei straordinarii* was also a court of appeal from the rota. (l)

The rota was constituted on the same plan as the rota of Rome, and the celebrity which the latter tribunal has given to this species of court renders the subject deserving of examination.

(m) The *magistrato della rota civile* was composed of six judges called *uditori*, who were doctors *utriusque juris* and foreigners. They were divided into two separate *magistrati* or courts, one of which took cognizance of the more

(i) Hieronimi, De Marinis Genua; Grævii Antiqu. Ital. Thesaur. tom. i.

(k) Bizaro, De Statu et Adm. Reipub. Gen.; Stat. Civ. Reipub. Gen. l. i. cap. iv. De mag. extraord.

(l) Stat. Civit. Reipub. Gen. cap. De appell.

(m) Stat. Civit. Reipub. Gen. l. i. cap. vii. De rota civili. et ejus jurisd. per tot.

weighty cases and certain special matters, while to the other were allotted lighter causes. In both courts each auditor, in his turn in order of seniority, held the office of *priore* or president, and it was this system of rotation that gave the name of *rota* to that celebrated species of tribunal. It was the duty of the *priore* for the time being to receive the papers in every cause, to set each cause down, in the order in which it was commenced, in a book or register, and to assign the causes respectively to himself and his colleagues, according to their date on the register and the respective seniority of the judges. The *priore* had also a special jurisdiction in certain cases. The judge to whom a cause was assigned had imposed upon him the duty of receiving the allegations or pleadings, examining the witnesses and evidence, and hearing the counsel and parties on the cause being ripe for a hearing ; all the interlocutory matters having been settled.

From the interlocutory decrees of the judge, however, acting as *commissarius* there was an appeal within eight days to the other two *uditori* of the chamber to which the said judge belonged. The *instructio causæ* being complete, and the parties having been heard by the auditor, it was his duty to report to the chamber of which he was a member, which was to give judgment on consideration of his report, together with the pleadings, evidence in writing, and documents. The auditors of the *rota* were bound to deliver to the chancellor of the republic within twenty

days a minute of each decision, together with the reasons, laws, and authorities on which it was founded. In doubtful or difficult cases the law enacted that the minute to be delivered to the chancellor should set forth the authorities conflicting with those by which the court had been governed in their determination.

Such are the constitutional forms of the courts called by the technical name of *rota*. The decisions of the Genoese *rota*, reported by Chartarius, himself an auditor of that court, are esteemed, though inferior in extent and celebrity to the decrees of the *rota Romana*; in which, as each of the principal Roman catholic states had the privilege of nominating a judge, there were always some of the first civilians and canonists in Europe. (*n*) There was a *rota criminale* constituted in the same manner as the civil *rota*, and composed of the prætor and two foreign doctors.

The next court below the *rota* was the prætor, who was invested with a very extensive civil jurisdiction (*o*), and below that magistrate were several inferior and special tribunals, such as the *consoli della ragione*, and the *magistrato dei rotti* or bankruptcy court. Such were the chief courts of the republic of Genoa, to which we must add the *magistrato di terra ferma* (*p*), which had a jurisdiction similar to that of the *supremi*

(*n*) Leg. Nov. Reipub. Gen. Erect. Rot. Crim.

(*o*) Stat. Civit. Reipub. Gen. l. i. cap. vi. De jurid. præt. Gen.

(*p*) Stat. Civit. Reipub. Gen. l. i. cap. v. De magistr. terræ firmæ.

in all causes in which the inhabitants of the two *riviere* or litoral provinces were concerned.

A *magistrato* or board of six nobles administered the military department; five others, entitled *magistrato dell' annona*, managed the supply of corn; five constituted the magistrato of the galleys, and a variety of similar bodies governed the different other departments of the public service. (*q*)

This system was somewhat too complicated to work well. No country has more splendid establishments founded by the public spirit of its citizens, and each of these,—such as the two hospitals and the albergo dei poveri, had its separate *magistrato* with exclusive jurisdiction, so that there were not fewer than sixty separate courts in Genoa.

The celebrated bank of St. George next claims our attention, but we will of course consider it not financially but legally. (*r*) That institution was first established in the year 1407, and was a corporate body composed of the creditors of the republic to whom the public revenues were hypothecated, and who acted as the bankers of the state; exercising of course a paramount and overruling influence over the whole financial affairs and administration of the republic. Eight citizens, elected by the shareholders, constituted the *magistrato delle compre di San Giorgio*. They were called the protectors of St. George,

(*q*) Hieronimi, *Dè Marinis Genua*.

(*r*) Bizari, *De Stat. et Admin. Reip. Gèn.* p. 921.

and were presided over by a senator. The resemblance of the bank of St. George to the East India company is striking; thus, the bank of St. George held the kingdom of Corsica and several other important possessions. The doge, however, was crowned king of Corsica, though the crown, after having been placed on his head by the dean of the senate, was immediately removed, to remind him of the transitory nature of his royal dignity. With the antient republic that distinguished institution the bank of St. George was extinguished, and nothing now remains but the palace, the galleries and the magnificent hall of which are filled with colossal marble statues of the munificent benefactors of the republic. In the hall particularly two rows of colossal marble statues, one above the other, extending entirely round the sides, present a striking appearance. It is a well known historical fact that the bank of St. George by refusing to advance money retarded the equipment of the Spanish armada for a whole year, and thereby enabled England to resist that formidable invasion; it is painful to be unable to add that England at a later period made some return for so valuable a service.

By the new statutes promulgated in the year 1576, through the influence of Pope Gregory X., the Emperor Maximilian, and Philip II. of Spain, various changes were made in the constitution of the republic. The alberghi, or twenty-eight houses and their aggregated families, were abo-

lished, and the assemblies called the portico nuovo and portico vecchio were dissolved. This measure was rendered necessary by the continual strife between the new and old nobles, who assembled, the former in the church of San Pietro di Banchi, and the latter in the basilica of San Siro, where they concerted measures to promote the success of their respective factions. At the same time the aggregated families were made to abandon the names of their respective chiefs, which they had added to their own. The most important alteration, however, was in the mode of electing the councils and colleges. In the month of December in every year the lesser council, presided by the colleges and doge, were to meet and to elect thirty nobles by ballot, and by a majority of three fifths; these were called the *trenta magnifici elettori*. The thirty nobles, assembled in the presence of the doge and senate, elected four hundred nobles who constituted the great council for the year ensuing, and out of the great council they elected one hundred, who constituted the lesser council for the year. The mode of electing the twelve senators and eight biennial procuratori was more complicated: two hundred and forty nobles were yearly elected by the great council and reduced to one hundred and twenty by the lesser council, and their names were cast into an iron box under three keys, kept respectively by the doge, the senior proctor, and the chancellor, and enclosed in another iron box, the keys of which

were kept by the senior conservator of the laws and the senior supreme syndicator. The boxes were unlocked with the five keys in the presence of the doge, the two colleges, and the great council, and the names of the new senators and proctors were drawn out by a child under ten years of age, after the boxes had been shaken. These elections took place every six months to fill up the vacancies occasioned by the senators and proctors going out of office in rotation, so that they remained in office only two years, except the ex-doges, who were perpetual procurators. All the other magistrates were elected by the colleges, the senate, or the councils. The elections, with the above-mentioned exception, were in every instance by ballot, and were conducted with great solemnity under the inspection of the conservators of the laws, whose province it was to see the observance of the minute and numerous formalities and regulations prescribed by the statutes. Such were the chief features of the new constitution of the Genoese republic. (s)

This account of the statutes of Genoa has necessarily been imperfect. There is no complete body of laws of the Genoese republic, similar to that of Florence.

The various *riforme* of the political laws are published separately from the *statuto civile*, containing the laws respecting the courts and civil jurisprudence of the state, and the *statuto cri-*

(s) *Leges Novæ Reipub. Genuens.*

minale embraces separately the criminal law. Of these compilations the most complete is the *statuto criminale*. The civil statutes are merely supplementary to the imperial law, which was the common law of Genoa (*t*), and they are therefore by no means extensive. They were commented upon by Flaminius Chartarius, auditor of the rota of Genoa (*u*), a writer of repute, who is several times cited as an authority by the celebrated Prosper Farinacius. Among the political laws many were, to use the expression of the canonists, *extravagantes*, or out of the compiled body of law, and it has therefore been necessary to set down many things in this account of them without citing the authority. Yet it is hoped that the sketch which has been presented to the reader of the ancient aristocratic republic of Genoa is sufficiently complete to prove not uninteresting.

Something must, however, here be added with respect to the Genoese nobility. They may be divided into two classes, the foreign and the municipal. Of the former class were the families like the Dorias, who were already nobles before they became citizens of Genoa, and the latter is composed of the families who, like the Cataneos, were originally in a humble station at Genoa, but became *nobiles civitatis*, or principal citizens, and subsequently were included among

(*t*) Duck, De Us. et Author. Jur. Civ. l. ii. cap. iii. § xxiii.

(*u*) Duck, De Us. et Author. Jur. Civ. l. ii. cap. iii § xix.

the patrician order. Of this class were the Fregosi and Adorni of Genoa, and the Medici, Caponi, and Pitti of Florence. Such families, under the name of *popolari*, existed in all the Italian cities, and in many cases became chief leaders of the popular party, and then tyrants or lords of their city. It sometimes happened that a family who were nobles in one city were *popolari* in another. Thus, when the twenty-eight families or *alberghi* were established in Genoa, the five popular families of Justiniani, Defornari, De Franchi, Sauli, and Promontori were included in the number. But the Justiniani and the Sauli were patricians before they settled in Genoa. They, however (particularly the latter), were always on the popular side, and affected to be *popolari*, for which reason they chose to be placed among the new nobles instead of being numbered with the aristocratic chiefs. This distinction of the new from the old nobles proved a fertile source of discord and disunion, and under the names of Portico Nuovo and Portico Vecchio, they became two standing factions, which were not entirely extinguished by the dissolution of the twenty-eight *alberghi*. Some of the families had important fiefs under the Emperor, and a few among them, such as the Fieschi, who were sovereign counts of Lavagna, were more feudal lords than republican patricians. But no one was permitted to assume any title of nobility within the territories of the

republic, except the prince Doria; and the nobles shared the title of *magnifico* with the judges, doctors of laws, and other superior functionaries of the state, while the title of *eccellenza*, which, at Venice, belonged to all the nobles, was confined to the senators and ex-doges. The rank of marquess was, however, allowed to all Genoese patricians when out of their country, and that rank they now enjoy.

To enter into the changes which took place in the government of the republics of Florence and Genoa, or to give an analysis of other bodies of statutes, would be beyond the scope and the purpose of this dissertation, which is to present a general, historical, and legal sketch of the municipal law of the Italian cities, with an illustrative account of the laws of a democratical and of an aristocratical republic.

The republic of Florence has been chosen because its corpus statutorum is perhaps the most extensive and complete of any, and that of Genoa has been preferred to the Venetian republic, because the latter has already been elaborately explained in the well-known treatise by Amelot de la Houssaie, and in the treatises collected in the fifth volume of the *Thesaurus antiqu. Ital.* of Grævius; particularly the treatise of Cardinal Contarini, *De magistratibus et repub. Venetorum*, and the *Dialogus de repub. Venet.* by Donatus Jannotius.

Those who desire to become more intimately

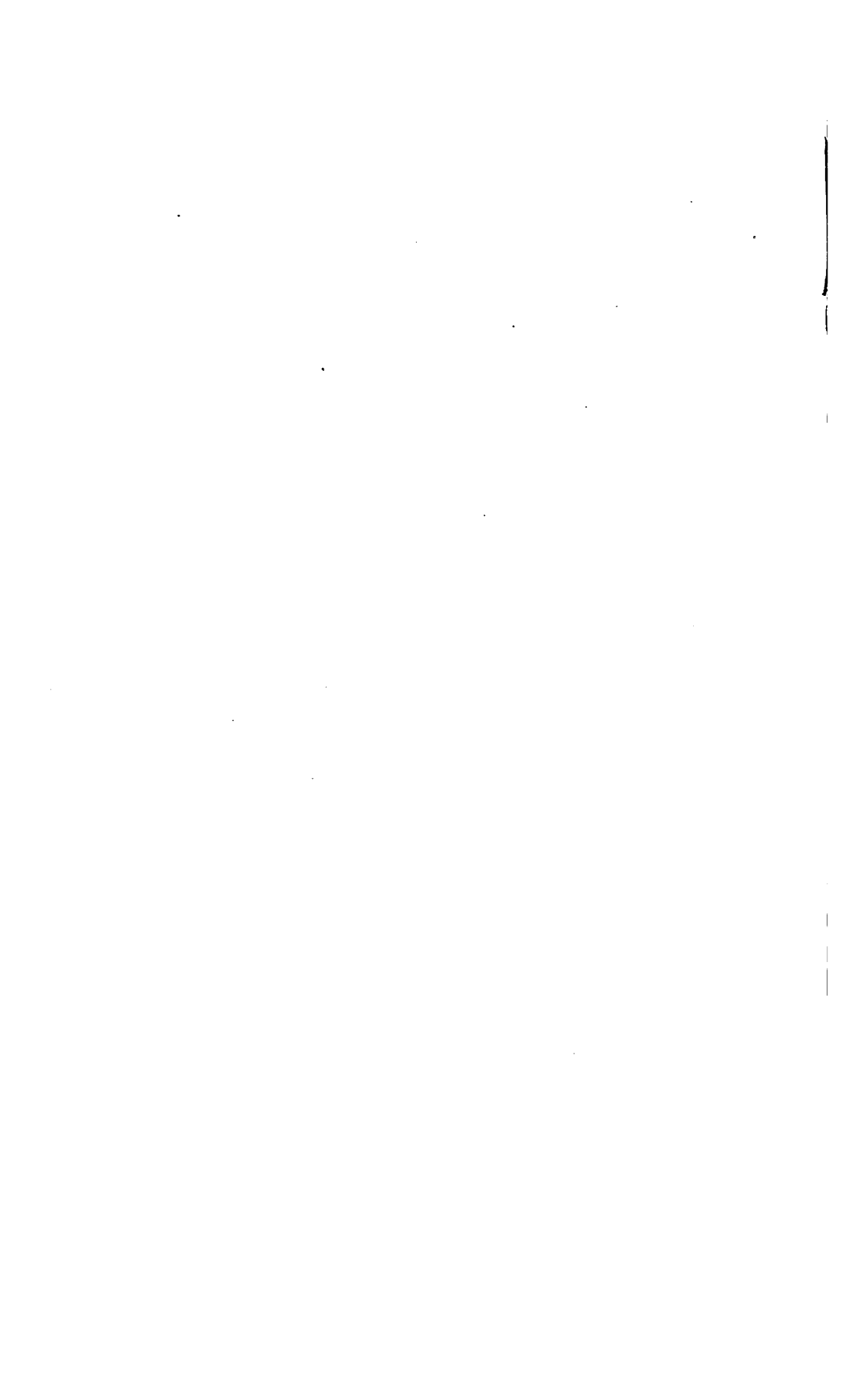
acquainted with the statutory jurisprudence of the civilians will find abundant information in the treatises referred to in a note to a former page. The consilia of Baldus, Paulus Castrensis, Hypolitus de Marsiliis, and Jason Maynus, and generally, more or less, all the other collections of consilia by the Italian jurisconsults, also contain much of this branch of law. The commentators are also exceedingly copious on this subject, particularly when they write on the title *De legibus* in the Pandects and Code, and on those titles in which the duties of different magistrates and public officers are laid down, as well as on the law *omnes populi* in the title of the digest *De justitia et jure*.

Several jurisconsults have written detached and special commentaries on the last-mentioned law; namely, Raynerius Forlivensis, who was the master of Bartolus, Johannes Sancto Severinatus, Johannes Crottus, and Marius Salmonius. These commentaries are collected together in a work entitled *Repetitiones seu commenta in varia jurisconsultorum responsa*, which was compiled in imitation of the *Tractatus universi juris*, published under the direction of Gregory XIII.

The canonists have not neglected the jurisprudence of statutes. Thus, Nicolaus de Tudeschis, cardinal and archbishop of Palermo, who is commonly known by the name of Panormitanus, is very copious on the subject of statutory law in his commentaries. Of course the subject

must have been one of great importance to the clergy, as all the collegiate, monastic, and other foundations, in which they were so deeply interested, were governed by statutes which were subject to that branch of jurisprudence.





TRANSLATION
OF THE
PLEADING OF PROSPERO FARINACIO
IN
DEFENCE OF BEATRICE CENCI
AND HER RELATIVES.

THE story of the Cenci is too well known to require much introduction to this celebrated argument. Beatrix Cenci, her mother, and her three brothers were condemned to death by the *sacra rota* (a) for parricide, and it was on appeal to the pope that the following oration was addressed to the holy father in mitigation of their punishment. It is extracted from the voluminous and scarce works of Prosper Farinacius, who lived in the sixteenth and seventeenth centuries, was the greatest authority in Italy upon criminal law, and held high dignities under the popes Clement VIII. and Paul V. (b)

(a) Vid. Decis. Sacr. Rot. Rom. Vener. 13 Jun. 1614. Romana de Cinciis.

(b) Prosperi Farinacii, Jurisconsulti Romani, olim in sacra Clementis VIII. Pont. Max. Consulta Consiliarii, et postea S. D. Pauli Papæ V. Camerae Apostol. Soc. Fisc.

His argument in the trial of the Cenci family is considered in Italy to have great merit; it affords a curious specimen of a judicial proceeding under the inquisitorial process by means of torture, and presents a lively impression of a (c) story which would have been long remembered even if the pencil of Guido had not immortalized the features of the principal client of Farinacius.

“ May God be with me. Holy father, though Beatrix Cenci impiously procured the death of her father Francis Cenci, yet if it be true, as is believed, that Francis, by imprisoning Beatrix in the dungeons of the castle of Petrella, and there barbarously treating her, endeavoured to overcome her chastity, it is not contrary to law to hold that she is deserving to be judged with some degree of clemency. It is clearly established law that the penalty of death affixed to the crime of parricide is not applicable where the crime proceeds,—either when committed by children or by parents, from one of the fourteen causes which legally justify disinheritance, and which are treated of in the (d) *Authentica, ut cum de appellatione cognoscetur. § caussas autem.*

Gen. Consulta Criminali, Consilium lxvi. For an account of Farinacius see Tiraboschi, *Storia della Letteratura Italiana*, vol. vii. p. 1089.

(c) Muratori relates the story of the murder of Francesco Cenci at some length. Vid. Murat. *Annali d'Italia*, vol. xv. p. 156—158, edit. in 8vo.

(d) This reference is to the collection of Novellæ called *Authentica*, and which must not be confounded with the *Authenticæ Codicis*.

“ The text upon which this position is founded is (e) *L. Divus Adrianus ff. de parricidiis*. Though that law speaks expressly of a son killed by his father because he had carnally known the concubine of his father or his own stepmother, yet it is extended by construction to parricide committed in any one of the cases comprehended in the already cited Authentica, according to the opinion of Bartolus and (f) Angelus, and Jason (g) upon the law *jus autem civile*, num. 28.

(e) The modern mode of citing this law would be thus, *L. Divus Adrianus ff. tit. de Parricid.*, or else with the number of the law instead of the initial words. Both modes of reference are condemned by Gibbon.

(f) Angelus here cited is Angelus Ubaldus, brother of the celebrated Baldus Perusinus. Panzirolus (*De Clar. Leg. Interp.* l. ii. cap. lxxi.) relates that his reputation was so high, that Pope Urban VI. *non ut alios ad pedis sed ad pacis osculum eum admisit*. He is said to have been deficient in memory, but possessed of strong and solid judgment. On account of his respect for truth and equity he has been called the doctor of judges, and his authority was particularly high on all practical questions. Angelus taught at Perugia and Florence; and having become very wealthy, he founded the monastery of St. Hieronimus, still existing, at Fiesole. He died in the year 1390, having been created a knight, count palatine, and consistorial advocate.

Bartolus was one of the glossators who was the head of a school, and stood high in his time. The glossators and ancient interpreters called “*doctores*” are now not much attended to by the civilians, having been superseded by posterior writers, particularly by Cujacius, who commenced a new era in the civil law; but they were formerly held in Italy to have force of law. Filangieri has a clever chapter upon their abrogation by the king of Naples. The glossators, however, frequently give rules and definitions which are most correctly deduced from the texts of law, and are in general use.

(g) Jason Maynus or De Mayno was born at Pezaro in

ff. *de just. et jur.*, Petras, sing. 2. num. 8. versic. Add, however, Carrer. *in pract. crim.* in verbo *penis debitis feriat*, num. 27.; Petr. a Plach. *in epit. delict.* cap. 22. num. 28.; Pract. Conrad.

the year 1433. He taught with the greatest success at the universities of Pavia, Bologna, Pisa, and Padua, where he attracted crowds of hearers, and splendid honours soon rewarded his legal eminence. The Duke of Milan, Ludovico Sforza, sent him on an embassy to Pope Alexander the Sixth. His merits as an orator and a man of letters, which, as well as his legal attainments, were of a very high order, obtained for him other diplomatic missions, and the titles of knight, count palatine, senator, and Cesarean patrician. Panzirolus relates a circumstance in the life of Jason which is curious, as it shows the high station occupied by the great civilians of those days. Louis the Twelfth of France, while he was in Italy, induced Jason to teach at Milan by magnificent offers, and chose to be present himself at the first lecture. On the appointed day Maynus, in robes of cloth of gold, received the king, who was accompanied by five cardinals, his pupils, with 100 personages of distinction, and made the professor take precedence of him in the school, saying that the teacher was superior to the scholar. The king, the prelates, and the nobles occupied the benches while the lecture was delivered, and at its conclusion Louis embraced the jurisconsult, and bestowed upon him a castle and fief. The principal works of Jason Maynus are a Commentary on the Digest and Code, numerous *Responsa*, and an Exposition and Explanation of the Title of Actions. Terrasson is of opinion that his remarkable eloquence and fine delivery contributed not a little to his extraordinary success, for perspicuity and arrangement are the chief merits of his works; and Ruinus, as well as some other jurisconsults, accuse him of plagiarism. He was a strenuous advocate for learning law by writing, and would never permit his pupils to read without a pen in their hands. Alciatus has summed up the merits of Jason and of the other principal civilians in a few lines, which the reader will not regret to find here:—

tit. *de homicid.* num. 14. in 22. limit; Menoch. *de arb. quest.* lib. 2. casu 356. et sequ. All these doctors with one assent hold, upon the before-mentioned law *Divus Adrianus*, that in such cases the penalty of natural death (*h*) is not applicable, but that either deportation or some other penalty is to be inflicted, at the discretion of the judge.

“ But that to attempt the chastity of a daughter is legally a *grave and infamous outrage*, and is consequently comprehended among the cases enumerated in the before-quoted Authentica, *ut cum de appell. cogn.*, as within the words *si gravis et inhonesta injuria eis ingess. erit*, and that such an outrage is greater legal *ingratitude* and a greater crime than the offence of a son

“ In jure primas comparatus cæteris .
 Partes habebit Bartolus.
 Decisiones ob frequentes actio
 Baldum forensis sustinet.
 Non negligenda maximè est tyronibus
 Castrensis explanatio.
 Opinionum tutius Symplegadas
 Superabis, Alexandro duce.
 Ordinis Jason et lucis nomine
 Videndus est properantibus.
 His si quis alios addit interpretes,
 Onerat quam honorat is magis.”

Polydamante, a natural son of Jason, was a jurisconsult of distinction, and held the office of prætor of Genoa. Vid. Gravin. *De Ort. et Progr. Jur.* cap. clxviii. Terasson, *Hist. de la Jur. Rom.* p. 416. Panzirolus, *De Clar. Leg. Interp.* p. 182.

(*h*) Natural death is here contradistinguished from civil or legal death.

corrupting the concubine of his father, or his own stepmother, which is expressly provided for in that Authentica, it is impossible to doubt, upon the authority of the cited doctors, who affirm that if a father is guilty of legal ingratitude towards the son, or the son towards the father, in both cases the legal quality or privilege of father or of son is forfeited by the offender.

“ Therefore much more is the paternal quality and privilege forfeited by a father who attempts the chastity of his daughter, for by that outrage he makes himself not her father, and shows himself not to be truly her father, as it is argued by (i) Albericus, who is followed and vouched by Marsil, on the L. *inauditum suum*, 2. ff. *de sicer. & sing.* 160. incip. *pater et filius*, and by Boerius, decis. 318. post num. 2. He there shows, by the writings of the ancients, that the conjunction of parents with their offspring seemed (k) horrible even to irrational animals;

(i) Albericus de Rosata obiit 1354; a native of Bergamo. He wrote a celebrated *Vocabularium Juris*, and comments on the civil and canon law. Marsil is Hypolitus de Marsiliis, a Bolognese doctor, who lived about 1500, and wrote consilia and detached comments. Boerius was president of the parliament of Bordeaux, and author of numerous juridical treatises, besides the decisions of his parliament which are here cited.

(k) A similar line of argument is pursued by Grotius in speaking of the prohibition of marriages between ascendants and descendants, De Jur. Bel. et Pac. l. ii. chap. v. § xii. Grotius, however, chiefly dwells upon the incompatibility of the conjugal union with the relation of an ascendant to a descendant, as well as the evils resulting from the toleration of such marriages.

and hence many examples are related in which parricide committed under such circumstances as those of the present case remained unpunished, as in Cælius, lib. 2. cap. 27, and Justin, lib. 1, where we read of Semiramis killed by her son Ninias because she desired incestuous love with him; and in Plutarch, in *Paralip.*, we read of Cyane, who stabbed with a sword her father Cyamnus because he had debauched her, and of Medullina, who, having been violated by her father Aruntius while he was intoxicated, put him to death; and in Cicero, *pro Milone*, of Orestes who had killed his mother for her crimes, and was first condemned by half the number of his judges, but was finally acquitted by Minerva.

“But the text of the law 1. § fin. ff. *de sicar.* is more specifically applicable to the present case, and favourable to the cause of this most unhappy woman. In that law it is provided that any one putting to death another who is attempting violence upon him or those near to him in blood is to be acquitted of any guilt, and the (*l*) gloss upon that law cites the L. *isti quidem*, ff. *quod metus causa*, in which it is laid down that the dread of violation is greater than the dread of death. The glossator also cites the text in the L. 3. § *quod ait prætor* in fin. ff. *de incend. et ruin. et naufrag.* In that law we find that that

(*l*) Glossas vocamus, quòd hæreas veluti per linguas; legum sententiæ alioquin obscurè panduntur. Gravina, De Ort. et Progr. Jur. Civ. cap. cxliv. From the word *glossa* is derived the synonymous Italian word *chioso*.

is not held to have been wrongfully done which was done in self defence by one who could not otherwise defend himself, and upon this point those things are relevant which are to be found in (m) Carrer. in pract. crim. in tract. *de homicid.* § 26. *excusatur*. There, after other things upon the same question, he comes to a general conclusion that the law excuses the slayer of any one who attempts to know by force either the said slayer or any one near to him in blood or affinity; and you may read in Valerius Maximus, lib. 6. c. 1. *de pud.* rubr. 12., that C. Marius Imperator decided that C. Lucius Nepos was lawfully killed by C. Plotius, a manipulary, on whom C. Lucius had made an atrocious attempt. (n) Thus also we read in l. 2. § init. ff. *de orig. jur.* that Virginius was acquitted from the homicide of his daughter, though she was innocent, because he killed her to save her from the brutality of Appius. It follows, then, that Beatrix Cenci is much more to be dealt with indulgently by the law for killing her father, who was a criminal, and endeavoured to overcome her chastity.

“Nor let the fisc argue that Beatrix should not have slain but should have accused her father, as it seems to be pointed out by the text in L. *inauditum*, ff. ad leg. pomp. *de parricid.*; for

(m) Ludovicus de Carreriis, a criminalist of repute, who wrote *Tractatus de Hereticis*, and *Practica Caus. Criminalium*.

(n) And see the argument of Cicero pro Milone in the first part of the *Confutatio*.

not only was she deprived by her father, who kept her imprisoned, of the power of preferring an accusation against him,—and she did frequently send letters to her relatives, in which she implored their assistance and complained in general terms of the cruel treatment which she suffered at the hands of her father, and memorials were then even presented on her behalf to the holy father, and these things are believed to be conclusively proved. But independently of these things, a few words are sufficient to answer that argument, for the text *L. divus*, ff. ad leg. Pomp. *de parricid.* enacts that in such case the parricide is not to be released unpunished, but to be punished by deportation, because he killed instead of accusing the parent; for if he had only preferred an accusation, there would be no penalty whatever to be awarded, as it is judiciously observed by the glossator on the said law *divus*, versic. *relegatur ergo*.

“Nor let the fisc argue (as I conceive I hear it argued) that the foregoing legal positions would be applicable if Beatrix had laid hands upon the deceased Francis Cenci at the very time of his committing or attempting the alleged crime, but that it is otherwise if the homicide is committed after the violence has ceased; as indeed was the case, since she procured his assassination by means of another person. For it is a sufficient answer, that the very text in *L. divus. Adrianus*, ff. ad leg. Pomp. *de parricid.* expressly speaks of parricide committed after the

lapse of a space of time since the outrage was committed ; for in that law the case is put of a father killing his son, not when taken in the fact with his mother, but while hunting in the woods, and therefore after the commission of the crime ; and yet the law imposes not the penalty of death, but that of deportation, as taking into consideration the dreadful provocation under which the parricide was committed. And this is well argued by Decian. (o) in his *Tract. Crim.* tom. 2. lib. 9. cap. 8. rubr. *de ascendent. descendent. occid.* num. 11. It is here tacitly implied that if the father had killed the son in the very fact, he would have been liable to no punishment whatever ; and this was the opinion of the glossators on the *L. divus*, in fin., and that opinion is expressly given by (p) Bartolus and Angelus,

(o) Decianus, an eminent Venetian criminalist, professor of law at Padua, wrote *Tractatus Criminales*, *Responsa*, &c. He lived in the sixteenth century. Vid. *Struv. Bibl. Jur.* p. 145.

(p) Bartolus of Sassoferrato was born in 1313 and died in 1355. He was the greatest doctor of his times, and enjoyed an extraordinary degree of reputation and authority all over Europe. Bartolus was the first who commented copiously upon the text of the imperial law, and applied to jurisprudence the Aristotelic method and philosophy ; but his writings are deeply imbued with the scholastic pedantry, and fanciful and innumerable distinctions of the Arabian school of Aristotelians, who studied that author by means of the comment of Averroes, which at that time was of paramount authority, and is called by Dante "*il gran commento.*" (*Inferno*, cant. iv. v. 144.) Bartolus is, however, very profound, and even learned, for the time in which he lived, as well as accurate in point of argument, though too subtle. He was a native of Sassoferrato, and taught with the greatest

and many others, cited by (q) Bertaz. consil. 356. num. 18. lib. 2. And this position is confirmed by those things which are written by (r) Afflict, in the consil. *si maritus*, n. 2. and Carrar in *Pract. Crim.* in tract. *de homicid.* versic. *excusat.* num. 5., where, after other things to the same purpose, he comes to the conclusion that *justus dolor* mitigates the penalty even where the homicide was committed after a lapse of time since the provocation.

“ But as to the special point of law touching homicide committed through fear occasioned by danger of violation, it is laid down by the glossators on the law *isti quidem* and *L. metum*, in

success at Pisa and Perugia, from whence he was sent as ambassador to the emperor, by whom he was raised to high honours. He was extravagantly eulogized by his contemporaries and the successors of the doctors of his school. Vid. Gravin. De Ort. et Progr. Jur. cap. cxliv. et al. et Cujac. Obs. l. xii. cap. xvi. Bartolus was a doctor of paramount authority for several centuries in Spain, but was not so much followed in France, except in the fourteenth and fifteenth centuries. The extent of his learning in matters unconnected with his profession added to his reputation. He wrote on the Institutes, on several books of the Code, and the greater part of the Pandects, besides which he wrote a book of consilia. Terrasson, Hist. de la Jur. Rom. p. 411, 412.

(q) Bartholomæus Bertazzolius, author of *Responsa sive Consilia in Criminalibus*, a native of Ferrara, who lived in the sixteenth century; counsellor and ambassador of the Duke of Ferrara, and commentator on the statutes of Ferrara.

(r) Mathæus de Afflictis, a Neapolitan noble, lived about the year 1510; wrote on the municipal law of his country, &c.

1 (s) Gloss, ff. *quod met. caus.*, and is proved by the text in L. 1. ff. eod. tit., that that fear need not be caused by immediate, but may be occasioned by future danger (as indeed Beatrix always had such danger hanging over her), for that text says that fear is to be understood to signify a perturbation of mind arising not only from present, but even from future, danger. It follows, then, that whatever Beatrix may have done she must be held to have done by reason of imminent or future danger and fear, and she is on that ground deserving of legal excuse, as having committed homicide in the defence of her own honour. (t) Clar. in *Pract.* § *homicidium*, versic. 4., idemque (u) Asin. *Consil. crim. diversor.* 114. num. 2. et sequ. lib. 2.

“ And if Beatrix was actually violated, she killed her oppressor, avenging thereby the outrage committed upon her; and she is also legally excusable *propter justum dolorem*, even if she killed him after a lapse of time since the perpetration of the outrage. And these things I have pleaded in favour of Beatrix.

“ With regard to Bernard Cenci, who is also

(s) Where the reference is *Gloss*, without name, the Acursian gloss is meant.

(t) Julius Clarus, a criminalist of the highest repute, held high offices under the Emperor Charles the Fifth and Philip the Second. Vid. Panzirol. *De Clar. Leg. Interpr.* l. ii. cap. clxxxii.

(u) Geo. Bapt. Asinius, a Florentine jurisconsult, wrote a treatise *De executionibus*, and *Practica aura*, or a comment on the *statute* of Florence, and *consilia*; he lived in the time of Cosmo de Medici.

prosecuted for parricide, as having confessed that he gave his assent to the negociation concluded by Olympius the assassin with James Cenci, I first place before the eyes of your holiness his tender and minor age, for at the time when the crime was committed he had only reached his sixteenth year (as the facts have been represented to me), and this fact leads to the application of the legal conclusion, that, though in criminal cases minors have not the benefit of *restitutio in integrum*, so as to be excused from all punishment, L. Cod. *si advers. delict.* L. *si ex causa*, § *nunc vidend.* ff. *de minor.*, yet merciful consideration is to be had of that age, and the penalty of the crime is to be mitigated; L. *fere in omnibus*, ff. *de reg. jur.* L. *aut facta*, § *personam*, ff. *de pœnis*; Clar. in *Pract.* § fin. quæst. 60. in princ. And that legal conclusion is applicable to the case of every species of crime; dict. L. *fere in omnibus*, ff. *de reg. jur.* L. *aut facta*, § *personam*, ff. *de pœnis*, Clar. in *Pract. Crim.* § fin. quæst. 60. in princip., and even to atrocious crimes, as it is shown by Alberic. in L. *auxil.* § *in delict.* num. 3. ff. *de minor.*; Joan de Anan. in cap. 1. num: 8. in fin. In Gloss. fin. *de delict. puer.*; Gulielm. (x) Mayer in L. *fere in omnibus*, num. 14.; (y) Aret. in § *in summa*, num. 1.; *Inst. de oblig. quæ ex delict. nasc.*

(x) Gulielm Mayer, a Neapolitan jurisconsult, commented on the title *De reg. jur.*, and wrote consilia.

(y) Franciscus Aretinus de Accolitis, a commentator on the Pandects and Institutes. Vid. Struv. Bibl. Jur. p. 145.

et in tract. *De malefic.* in verb. *scienter et dolose*; post num. 14.; Gerand. Maynon. consil. 64. num. 1. in fin.; (z) Roland. consil. 7. num. 8. lib. 3.; Franc. Calder, in *repet. L. si curatorem*, in verbo *vel adversarii dolo*, num. 61.; Cod. *de in integr. restit. minor.*

“ It also appears to be the common and received opinion of the doctors that nonage is a lawful cause for mitigating the punishment of many most atrocious crimes; as, in the *crimen raptus*, it was answered by (a) Cumanus, in the case of a youth below eighteen years of age; consil. 95. incip. *Christopherus*, ad fin. versic. *et hæc benignior sententia.* And Cumanus was followed by Rolandus, consil. 77. num. 9. lib. 3.; (b) Hyppol. Riminal. *Consil. crim. diversor.* 135. num. 16. tom. 1. And as respecting the crime of *incest*, we have the text in *L. si adulterium cum incestu*, § *fratres*, ff. ad leg. Jul. *de adult.*, upon which text the same position was held by Novel. in tract. *ad defensam part.* num. 37.; Maurit. *de restit. in integr.* cap. 153. num. 5. in fin.; Roland. d. consil. 77. num. 7. L. 3.; (c) Me-

(z) Rolandus, a commentator who lived in the fourteenth century. Vid. Gravina, *De Ort. et Progr. Jur. Civ.* cap. clxiii.

(a) Cumanus, a Lombard commentator on the Digest, who lived in the fourteenth century. Vid. Gravin. *De Ort. et Progr. Jur. Civ.* cap. clxix. et Struv. *Bibl. Jur.* p. 145.

(b) Hyppolitus Riminaldus, a Ferrarese commentator on parts of the Digest and Code, who lived in the fourteenth century. Vid. Gravin. *De Ort. et Progr. Jur. Civ.* cap. clxix.

(c) Menochius, the celebrated author of the treatise *De præsumptionibus*. He was professor at Padua at the end of

noch. *De arb. quæst.* lib. 2. casu 329. num. 3.; and as touching the crime of *falsifying coin*, which is included in the *crimen læsæ majestatis*, we have the text of the law, 1. § *impuberes*, cod. *de fals. monet.* There it is provided that persons below puberty are absolutely excused by the law. But it was laid down in Caccialupus (*d*) *Consil. crim. diversor.* quæst. 5. num. 3. in fin. et sequ. tom. 1., and that opinion was followed by Rolandus, dict. consil. 77. n. 9. sub. versic. 18. &c., and Hyppol. Riminal. consil. 245. num. 24. lib. 3. From these authorities it appears that nonage is commonly held to be a plea for excuse even in the most atrocious crimes.

“Nor is the (*e*) *motus proprius* of Pius IV., enacting that in cases of homicide nonage shall not be pleadable where the culprit has completed his fourteenth year, in derogation to the legal doctrines which I have established; for, in the first place, it may be answered to that position that that *motus proprius* speaks of outlawed persons and persons condemned *in contumacy*, and must, therefore, not be extended to persons not

the sixteenth century, and wrote a voluminous treatise *De arbitrariis judiciis et causis*, besides consilia.

(*d*) John Baptist Caccialupi, first advocate of the rota of Rome, and professor at Siena in 1464, wrote several treatises on civil, canon, and feudal law. Vid. Terrasson, *Hist. Jur. Rom.* p. 412.

(*e*) A *motus proprius* is a bull issued, not upon a petition or memorial, but spontaneously.

(f) proscribed or outlawed, and not condemned *in contumacy*.

“ And, notwithstanding this law, the judges are not disabled from granting a mitigation of punishment on the ground of nonage, as was proved by (g) Oddus Sfortias, upon the construction of this *motus proprius* (*de restit. in integr. part. 2. quæst. 81. num. 33. et sequ.*); and in the latter part of his *consilium* he affirms that it was so decided at Perugia in the year 1583.

“ I answer, in the second place, that the *motus proprius* speaks of homicides, and it is therefore not to be extended to *participators* and *consenting parties*, as it is argued in a consultum of Cornelius, consil. 159. lib. 1.; and the same doctrine was held upon this very constitution by (h) Flamin. Cartar. *de execut. sentent. cap. fin. num. 233*. There, after other things on the same point and to the same purpose, he asserts the general opinion of the doctors to be that statutes touching homicides are not to be extended to *consultors*, *advisers*, and *accomplices*.

“ Nor can these arguments be answered by saying that this is a case, not of simple *counsel*, but of *mandatum*; in which case that which is law

(f) The word in the original is *banniti*, which must be rendered *outlawed* or *proscribed*.

(g) Oddus Sfortias. Vid. Struv. Bibl. Jur. p. 197—249.

(h) Flaminius Chartarius was author of Decisions of the Rota of Genoa, of which court he was a judge. He also commented on the statutes of Genoa. Vid. Duck, De Us. et Author. Jur. Rom. l. ii. cap. iii. § xxix. et § xxiii.

with respect to the delinquent is to be extended to the *mandator*, for the *mandator* and the *mandatarius* are liable to the same punishment, L. *non solum*, § *si mandantis*, ff. *de injur.* ; L. Cornel. § *fin.* ff. *eod. tit.* ; and he who does any thing by means of another is held to have done it himself, L. 3. § *dejecisse*, ff. *de vi et vi armata* ; L. *ita autem*, § *gessisse*, ff. *de adm. tutor.* and many other similar texts of law. (i) For to this answer it may be replied, first, that the rule that the *mandator* and *mandatarius* are liable to the same penalty, refers not to the legal but to the statutory penalty. For the *mandator* is held to commit the crime, not in fact, but by construction, and, therefore, a penal constitution speaking of the person of the homicide (as is the case with this bull) does not comprehend the *mandator* ; though it might, perhaps, be otherwise if the constitution had spoken *in rem*,—not of the criminal, but of the crime itself. And this doctrine was taught by Bartolus, in L. *aut qui aliter*, § *hæc*

(i) To comprehend this argument, it is necessary to observe, that when the civilians speak of *jus ordinarium* they mean the law contained in the *corpus juris* ; which is called *gius comune* or common law in Italy, and is contradistinguished from *jus statutarium*, by which is meant the law enacted by the legislature of the country, or the municipal law of the country strictly so called. Thus Voet, after his title *De legibus et senatusconsultis et constitutionibus*, has a chapter *De statutis*, in which he explains the effect and nature of municipal laws. Thus each of the cities and republics of Italy had their *statuto*, which was a collection of municipal laws, usually compiled by one of the successors of the school of Irnerius, in a manner supplementary to the *gius comune*.

verba per illum text. num. 3., and by (k) Alexander especially, upon the same text, in addit. in fin. ff. *quod vi aut clam*; and this doctrine has been generally followed by the doctors, as may be seen in Jason, who, after citing the opinions of the others, thus testifies to the general opinion, in L. *si quis id quod*, num. 36. ff. *de jurisd. omn. jud.*; Afflict. decis. 404. num. 6.; Boss. in tit. *de pœn.* num. 14.

“ But I further reply, in the second place, (l) (and may your holiness deign to take this most specially into consideration) that Bernard did not confess that he was a principal author of the parricide, but said merely that he was conscious of and a consenting party to the previous covenant between Beatrix and Olympius the assassin. This is clearly shown by the very express words of Beatrix in her confession of the crime: she says, *And I said to Olympius that I would not have any thing done, unless with the consent of my brothers, namely, Giacomo, Bernard, and*

(k) Alexander Imolensis, or Alexander Tartagnus Imolensis, commented on the Digest and Code. He was a scholar of Paulus Castrensis, and lived near the end of the fifteenth century. Obiit 1487, Gravin., and vid. Terrasson, Hist. p. 414.

(l) The distinction here drawn is between an accessory or accomplice who actually contributed something either by counsel or deed towards the perpetration of the crime, and one who merely gave his assent to the already matured designs of others. In our law both would be equally accessories before the fact, and punishable equally with the principal delinquents; but the distinction is, however, a clear and accurate one.

Paul, and thus Olympius remained agreed that he would go himself and speak to them ; and he said to me, " Your brothers will very well agree." And a little further down she said, And when Olympius returned from Rome, he said to me, that he had spoken to Giacomo, and that he had not spoken to the others, because he had not chosen to have to do with boys. And with this the confession of Bernard himself agrees, for he says, (m) Olympius spoke with my brothers Giacomo and Paul, and said that he had resolved to kill our father because he had wounded his honour, and had insulted him at the castle ; and that, moreover, our sister Beatrix had reason to complain of our father, who kept her so imprisoned, and that she would not put up with that life any longer ; and that therefore she had resolved to put him to death, and that she wished Olympius to do the deed ; and that Beatrix wished that it should be done with the consent of Giacomo, Paul, and me ; that is to say, she wished that we should know it before the thing was done, and that we should be well content that it should be done, and that therefore he had come to Rome to know our will. And Giacomo, Paul, and I told him to do what he pleased, as has been said by the Signor Giacomo. Now, it

(m) The extracts from the confessions are in Italian. These confessions were taken down in writing in the presence of a *judex commissarius*, and extorted by torture, except in the instance of Bernard, *propter minorem ætatem*.

follows, that as Bernard gave no *mandatum*, but confesses only to have given consent, the argument of the procurator-fiscal general is inapplicable, namely, that the constitution punishing the delinquent is to be extended also to the mandator.

“ But again I submit to the consideration of your holiness the fatuity and the imbecility of intellect of this youth (which I take as having been proved) and which render it not astonishing that giving way, in all probability, to the influence of his brother James, he should have been persuaded to give his consent and acquiescence. Therefore, by reason of this imbecility and fatuity of mind, added moreover to his tender age, he should, in my opinion, be excused from the (n) ordinary punishment; for that legal effect is produced not only by absolute insanity, but by any debility and defective state of mind. And the doctors, in treating of these matters, speak indiscriminately, not only of maniacs, but of persons insane, fatuous, out of their mind, phrenetic, melancholy mad, and *mente capti*, and every other variety of affection of the same kind, as is

(n) *Pœna ordinaria* has the same meaning as *pœna legalis*, namely, the punishment awarded by the law, but which may in certain cases (such as nonage) be mitigated by the judge; Alberic de Rosata, Diction. Jur. in verb. *pœna*. § *An iudex potest ex causa*. But *pœna legalis* is sometimes to be understood as contradistinguished from *pœna statutaria*. Alberic de Rosata, in eod. verb. § *Quid est imposita pœna legal*.

shown by Alexander, in *L. si ex facto*, num. 34. (o) ff. *de vulg. et pupil. subst.*; Marian. Soc. (p) in cap. *ad audientiam*, num. 28. ad fin. *de homicid.*; Blanc. in *Pract. Crim.* in § *imbécillitate*, etiam num. 11.; Gram. consil. 16. num. 7. in fin. et sequ.; Clar. in *Pract.* § fin. quæst. 60. versic. *item quæro*, and the same writer passim, and in general all the doctors.

“ Holy father, I cannot omit to say, that though the confession of Bernard may be generally true, yet it is not to be argued, that, as it came forth without the use of torture and upon a mere confrontation with Giacomo, it is to be considered as a spontaneous confession; for we have the remarkable words of the text, in *L. si quis ultro de maleficio fateatur, non semper ei fides habenda est*. For sometimes accused per-

(o) The precise origin of the mark ff. to denote the Pandects has been matter of dispute; but, like the meaning of the word *palea* in the decree of Gratian, it has never been satisfactorily explained.

(p) Marianus Socinus was a Siennese doctor of the fifteenth century, who occupied the chair of jurisprudence in the cities of Siena and Padua. He was a successful cultivator of literature and the fine arts, as well as a distinguished commentator on civil and canon law. His works principally relate to ecclesiastical law. His son Bartolomeo and his nephew Martino Socino were also distinguished civilians. The former was engaged by Lorenzo de Medici to deliver lectures at Pisa, and the latter had the honour of numbering among his pupils the celebrated Spanish juriconsult Antonius Augustinus, Archbishop of Taragona, whose extraordinary legal learning and talents, profound scholarship, and elegant style are highly eulogised by Cujacius in his *Observationes*. Regarding the Socini see Terrasson, p. 414.

sons criminate themselves by confession, through fear or some other cause ; and the fear of torture very probably induced this boy to confess in the manner in which he has confessed, as he might, very naturally, have believed, from what was said to him by Giacomo, that he would be put to the torture, as Giacomo was tortured. And thus both his immature age and his imbecility of mind may also, very probably, have contributed to make him confess as he in fact has confessed.

“ Now, upon the same principles upon which person labouring under a defect of intellect is entitled to indulgence if he commits a crime, as I have shown, so, if he *confesses* a crime, his confession is not to be taken as conclusive against him. (q) Bald. consil. 347. num. 4. lib. 5. ;

(q) Baldus, a native of Perugia, and usually called Baldus Perusinus, was the most distinguished among the pupils of Bartolus. At the age of seventeen he excited admiration by his comment on the law of the Pandects, *Centum Capue* in the tit. *De eo quod in certo loco*, and Paulus Castrensis informs us, that the depth of the questions which he asked in the schools was such, that Bartolus sometimes took time to consider before he answered them. Baldus was appointed early in life to the law chair in the university of Pavia, where he attracted students from the most distant cities. It is related that the Bishop of Pavia having asked him why laws were so uncertain and changeable, he answered, that legislators are like physicians, who apply remedies differently according to circumstances ; and that what is good in one case and at one time, is bad in another. We have very ample comments by him, but some of his works are lost. He died in the year 1404. His works are infected with the barbarism of his times, and he was more remarkable for the acuteness than the solidity of his reasoning ; but he is, nevertheless, a valuable writer from his great subtlety as well as from the

(r) Tyn. in L. 3. § *ignoscitur*, num. 75. in fin. ff. *ad Syllan.*; Foller, in *Pract. Crim.* num. 1. par. 3. princ. verb. *si confitebuntur*, num. 28. fol. *mihi*, 397.

“ But there is another and a very powerful argument, for the aforesaid confession was made upon Bernard being named by Giacomo on confrontation with him, and afterwards when Giacomo confessed his sins to a priest, the priest refused to grant him absolution unless he would, as far as lay in his power, revoke and deny what he had falsely said to criminate others. And upon that he solemnly, and in writing, exculpated Bernard; and that exculpation was, as I am informed, transmitted to the most illustrious Lord Cardinal of Alexandria, that it might be certified to your holiness.

“ Now, though I am aware that that exculpation does not destroy the full proofs of the crime, and much less the express confession of the party, yet it cannot be denied that it does weaken those proofs and that confession, as is

extent of his works. Jason said that Baldus was ignorant of nothing. (Terrasson, *Hist. de la Jur. Rom.*) Baldus, without any colleague, drew up the statutes of the republic of Ticino, and that community were so highly sensible of his merit, that they enacted a law that no one should receive the doctoral cap without his recommendation. Gravina, *De Ort. et Progr. cap. clxv.*

(r) Johannes Tyneus commented on the *senatusconsultum Silianum et Claudianum*, and wrote several juridical treatises. His name was *Jean Feu*, and he was president of the parliament of Rouen under Louis the Twelfth. Vid. Terrasson, *Hist. de la Jurispr. Rom.* p. 450.

shown by (s) *Grammat. rot.* 3. num. 11. in fin. ; *Marsil. consil.* 109. num. 30. et sequ. ; *Tiber. Decian. consil.* 18. num. 65. et sequ. lib. 3. ; *Hyppol. Riminal. consil.* 4. 20. num. 17. lib. 4. But these arguments respecting the confession of Bernard are superfluous and unnecessary to the cause, for it is sufficiently clear that, on the grounds before urged, namely, his nonage and fatuity, he is legally exempted from the ordinary punishment.

“ With respect to Lucretia, the widow of Francis Cenci, it is made a humble supplication to your holiness that you will take into consideration her confession as it appears recorded. For the truth is, that though at first she also did consent to the perpetration of the parricide by means of the assassin and by the order of her daughter Beatrix, and perhaps even by that of Lucretia herself, yet she did revoke her consent or mandate before any thing had been attempted by the assassin. And, indeed, she earnestly and strenuously implored the assassins, on the day before the crime was committed, to abstain from the perpetration of so dreadful an outrage, and made them leave the rooms where they had been placed to accomplish the crime, to the intent that it might not be committed. But on the day after, without the knowledge of Lucretia, and persuaded by Beatrix alone, they returned and assassinated Francis Cenci. Thus, and not otherwise, does

(s) *Thomæ Grammatici Icti, Neapolitani, consilia, vota, seu juris responsa.* 1 vol. 8vo.

she herself confess, and her confession is corroborated by the deposition of the assassin Marzio and of Beatrix. Here, then, is applicable the legal doctrine that where a mandator revokes the mandate, though the crime is afterwards actually committed, yet he is no longer liable to punishment for the crime, or responsible upon the mandate; text. in cap. *quicumque ibi, nisi licentiam re integra revocarent; de sent. excom.*; (t) Bart. in L. *non solum*, § *si mandator*, num. 13.

(t) In the following note, an attempt will be made to complete the sketch which has been already commenced, of the history and character of the successors of Irnerius, the first of the glossators. The interpreters of the imperial law are divisible into four classes or schools; namely, that of Irnerius, that of Accursius, that of Bartolus, and, lastly, the Cujacian school, which was founded by Alciatus, but was raised to its greatest splendour by Cujacius. Irnerius lived in the eleventh century (vid. *Tiraboschi, Storia della Letteratura Ital.* vol. iii. p. 612, et seq.), and was the second professor, but the real founder, of the school of Bologna; and he and his followers, partly out of deference to the well-known prohibition of the Emperor Justinian, confined themselves to mere glosses or short notes upon the texts of law, as well as paratitles or summaries, and scholia or abstracts, of the Constitutions. The Irnerian school, then, who are the *glossators* strictly so called, were mere expounders and expositors of the texts of the law. Accursius, the founder of the second school, was a Florentine doctor, who died in 1239. He analysed the observations of his predecessors, than whom he was more full and enterprising in his comments and glosses, yet he united conciseness to clearness in a very remarkable manner; but his writings are not without a taint of the defective learning and barbarism in literature of his times. He is, however, very highly spoken of by Cujacius, who considered him superior in accuracy of judgment to Bartolus. (*Cujac. Observ. lib. xii. cap. xvi.*) We come now to Bartolus, of whom enough has already been said

ff. de injur. angel. de malefic. ubi sup. sui, num. 15. Pract. Conrad. tit. *de mandante homicidium*, num. 6.

in the preceding notes, in which he and his school have been characterized as far more diffuse than any of their predecessors; learned for his times, and very copious, but sometimes fanciful, and often too elaborate and pedantic in drawing distinctions, and laying down and multiplying divisions and subdivisions of the subject. The most distinguished scholar of Bartolus was Baldus, whose acute and subtle judgment was wanting in solidity and correctness, so that he is more the jurisconsult of the forum than of the tribunal. Among the scholars of Baldus was the celebrated Paulus Castrensis (vid. *Tiraboschi*, vol. vi. p. 760, et seq.) or Paulo de Castro, who was the first doctor of his times, and was particularly remarkable for the conscientiousness, candour, and solidity of his arguments. He is considered a very safe guide. Castrensis drew up the *statuto* of the Florentine republic, and there is a tradition that he is also the author of the *statuto* of Genoa. We come now to the fourth school, viz. that of Alciatus. He was a Milanese doctor, and held very high offices and honours under the Emperor and the King of France, Francis the First, who gave him the collar of St. Michel. He died in 1500. Alciatus brought to bear upon the interpretation and developement of legal texts and doctrines very profound learning, and accomplished and highly cultivated scholarship. He was the founder of the *Erudita jurisprudentia*, to which, however, he did not give his name, for his fame was overshadowed by that of his great successor Cujacius, who is acknowledged to have been the greatest of all commentators. His great rival Donellus composed treatises, while Cujacius wrote comments; and the former is considered as the chief of the dogmatic, while the latter is the greatest of the exegetic school. They were opposed to each other, as synthesis is to analysis; and the orthodox Cujacius remained stedfast in the Roman faith, while the more enterprising, free-minded, and theoretical Donellus embraced the reformed religion. Both these great jurisconsults were encouraged and patronized by the illus-

“ And though it may be argued that the wife deserves punishment for not discovering to her husband that his life was conspired against, yet that argument would apply to the extraordinary punishment of relegation, and not to the ordinary punishment of death ; as is shown in the text *L. frater*, ff. ad leg. Pomp. *de parricid.*, and by De Marsiliis, upon that text, where he draws a general conclusion that a capital punishment is never awarded in cases of non-revelation except where the crime was to be committed against the sovereign or the pope ; and that this exception is not extended to any other case, even of those which are comprehended under the name of parricide.

“ There are many more arguments to be pleaded in favour of Giacomo, but I am compelled for want of time to omit them, leaving them to

trious chancellor L'Hôpital, their fellow countryman, and they first entitled France to occupy the highest place in the science of jurisprudence. They were succeeded by Domat, D'Aguesseau, Pothier, and a multitude of great juridical writers and magistrates, whose high reputation extends as far as civilization and science ; and in the sixteenth and seventeenth centuries Germany produced Voet, Vinnius, Bynkershoek, Heineccius, and a splendid series of great masters of jurisprudence. In the mean while Grotius built, upon the foundation stone laid about the year 1550 by Albericus Gentilis, the new fabric of international law ; public law in all its branches was assiduously cultivated in Germany ; Puffendorf further developed and extended the system of Grotius ; and the legal science reached a very high pitch of polished and highly cultivated greatness in the eighteenth century.

the other doctors who are writing in his defence. I will only add this, that if Beatrix his sister; who was the principal agent in the commission of the crime, is deserving of some indulgence on account of the circumstances in which she was placed, it follows, that he who was merely a partaker in and cognizant of the crime cannot lawfully be condemned to a more severe punishment than the principal(*u*), according to the rule *agentes et consentientes non dispari sed pari pœna debent plecti*. This rule is applied in *L. si quemque c. de episc. et cler.* and in *L. quisquis c. ad leg. Jul. de maj.*, and many other laws, cited by Boss. in tit. *de mandit. ad homicid.* num. 59., and by Clar. in Pract. § fin. quæst. 88. in princ.

“ Holy father, these things I have submitted to your holiness, in the most arduous cause committed to me, that you may feel at liberty to grant some mitigation of punishment, and exercise your compassionate clemency in favour of those most miserable prisoners, who do not rest upon the favourable sentence of the judge, nor the mercy of the advocate-fiscal general(of which, however, they have a confident hope), but await upon their bended knees and with the most profound submission the judgment of your holiness.”

(*u*) The same rule prevails in our law with respect to principals and accessories. Vid. Coke, 4th Inst. chap. *Accessories*, and Hale, Pl. of the Crown, chap. *Accessories*.

Here ends the pleading, but there is a note by Farinacius to the following effect :—

“ They were all punished with death except Bernard, who was condemned to the galleys, with confiscation of all his property, and also to be present at the execution of the others. Their crime was so horrible and unheard of,—two sons and a daughter and a wife conspiring to murder their father and husband, and that by means of a paid assassin,—that it may well be said that it was only through the greatest clemency of the holy pontiff that Bernard, being a minor, was saved from death, as, indeed, it was confidently hoped would have been the case as to Beatrice, if she had been successful in proving her plea, which she did not in fact prove. *Praise be to God.*

Prosper Farinacius, jurisc. Romanus.”

Flaminius Centolinus, the annotator of Farinacius, observes upon this pleading, that Bernardo Cenci obtained a mitigation of punishment upon all the grounds urged in his favour by Farinacius taken together, and not solely upon the plea of nonage. Flaminius cites two cases within his own knowledge, in which boys, in one instance below fourteen years of age, were capitally punished, and cites authorities in favour of the position that minority is not pleadable *in atrocissimis delictis*.

The law seems to have been unsettled in Italy upon that question in the time of Farinacius, but the maxim *malitia supplet ætati* was after-

wards followed as the leading principle by the civilians.

In this argument we have a curious specimen of the peculiar jurisprudence which prevailed among the civilians before the Cujacian school, namely, the too great weight given to the expositions of the law by commentators, which were even sometimes preferred to the text of the law itself. This system probably arose from the imperfect state of learning at the time of the first schools of glossators, who, being themselves superior in legal erudition to their contemporaries, and many of them men of great ability, acquired an authority superior to the laws which they expounded, and which few except themselves understood. Hence the saying, that it was better to have the gloss in your favour than the law.

The multitude of the writers on the civil law and the indiscriminate manner in which they were received as authority, afterwards reduced the legal science to a state exceedingly vicious, when compared to its extraordinary purity under the auspices of Cujacius and the subsequent great masters of jurisprudence.

The doctrine of the more correct school of civilians is neither to reject nor blindly to follow the authority of commentators. The law is the first and principal rule, to which the judge must conform, and when the terms of the law are clear no commentator should be listened to; but where there is a doubt, the

judge, who hears advocates interested in the success of their respective arguments must listen, with infinitely greater deference, to the arguments advanced in the writings of men of great learning and reputation, who argue the question in dispute solely for the purpose of proving what is their opinion, formed after the most mature deliberation. Upon that principle the opinion of one of those great writers, who have been recognized as oracles of the law by the general consent, not only of their own countrymen, but of the whole continent of Europe, must, where the judge doubts, be decisive.

The authority of judicial determinations rests partly upon the same grounds, with this difference; the commentators look to the law only, while the judge has to apply the law to facts, with which the law must frequently be mingled. (x) *Modica circumstantia facti magnam diversitatem juris inducit*. Now, the facts in the precedent may not be fully or accurately reported, and thus errors may arise in the application of the decision. Besides, judges must despatch the business before them within a certain lapse of time, and they are therefore often hurried, while their attention is divided between the facts and the law. Few judges, indeed, can possibly be equal in ability, talent, or learning to the few commentators to whom the civilians in all doubtful cases bow in submission. Such men appear but once or twice or three times in a

(x) Molinæus, vol. i. p. 755. n. 164.

century ; but, independently of this, to extract the law from a decision, the facts in that case must be juxtaposed to the facts in the one which is before the judge, though the facts in both cases may be doubtful or misrepresented. Then the law is to be extracted from the decision and applied to the facts in the suit ; hence a great danger of error. The commentator is free from every one of these objections.

It is true that the commentator makes use of hypothetical or real cases, or cases decided upon by tribunals, but the commentator applies principally to developing the abstract principles or reasons of the law, and following them to their remotest and most minute deductions, while the facts, whether real or hypothetical, are used more for illustrating the more minute details of the practical application of the rule than as the actual sources whence the rule is to be drawn by future judges and advisers. Thus the decisions of cases resorted to by the commentator are in fact practical logical deductions from principles previously established ; therefore the judge takes those principles as premises, instead of deducing the principles from the decision upon the facts. It is also obvious that the statement of facts by a commentator is not susceptible of error, to which reports of decisions must be more or less liable.

The inevitable effect of judgments being founded on adjudged cases, is that the law is in some degree lost sight of, while the judge toils

to analyse and compare the facts of the two cases. Besides, unless he submits to incur the risk of embracing any error into which his predecessor may have fallen, he must revise the precedent, and thus undergo the labour of deciding again one or more already decided cases before he decides the one which is before him. Here, again, the liability to error is proportionably increased by the multiplication of the processes which the mind of the judge must perform prior to forming his opinion. But it must not be inferred that decisions have no weight with the civilians. Undoubtedly, when a specific proposition of law has been laid down in a judgment of a magistrate of great reputation(*y*), his opinion must be entitled to great authority with other judges, and must contribute to render the law on that point fixed and certain. It is for this reason that decisions have been called by distinguished civil law writers *the anchors of jurisprudence*. But still (*z*) *the law* should

(*y*) *Res judicata pro veritate accipitur*, l. c. vii. ff. De reg. jur. This maxim of Ulpian is a presumption *juris et de jure* only when the same questions are in dispute again between the same parties (l. xxv. ff. De stat. hom., l. vii., xii., xiii., et xiv. ff. De except. rei judic.), except upon appeal. (l. i. ff. De appel.) The reason of this is to be found in the maxim, *expedit reipublicæ ut litium sit finis*. In other cases it is a presumption, the weight of which in each case is to be appreciated by the judge.

(*z*) *Legibus, non exemplis, judicare oportet*; l. xiii. Cod. De sent. et interloc.—*Non spectandum est quid Romæ factum est, sed quid fieri debeat*; l. xiii. ff. tit. De offic. prææs.—*Nemo judex vel arbiter existimet neque consultationes quas non rite judicatas esse putaverit; sequendum et multò magis*

never be lost sight of, and should be the ultimate and supreme guide of the judge; it is by thus scrupulously adhering to the true sources of jurisprudence, without rejecting the assistance of illustrious commentators and magistrates, that the law is maintained in its purity, and is at the same time not prevented from acquiring riches, and increased certainly from the ability and learning of the schools and of the forum.

The necessity for judicial and scholastic expositions and interpretations of the law arises from the impossibility of framing the law so as to embrace every possible case (*a*), and also be-

sententiam eminentissimorum præfectorum, vel aliorum procerum, (non enim si quid non benè dirimatur, hoc et in aliorum judicum vitium extendi oportet, cum, *non exemplis, sed legibus judicandum sit*,) neque si cognitionales sint amplissimæ præfecturæ vel alicujus maximi magistratus prolatæ sententiæ: sed omnes judices nostri veritatem, et legum et justitiæ sequi vestigia, sancimus; l. cit. sup. Cod. Adde § ult. Inst. De satisdat.—Res inter alios judicata neque emolumentum afferre his qui judicio non interfuerunt neque præjudicium solet irrogare; l. ii. Cod.—Quibus res jud. non noc.; nec in simili negotio res inter alios actas absenti præjudicare sæpe constitutum est; l. iv. Cod. eod. tit.; l. lxiii. ff. De re judicata.

(*a*) Neque leges neque senatusconsulta ita scribi possunt ut omnes casus qui quandoque inciderint comprehendantur, sed sufficit ea quæ plerumque accidunt comprehendere; l. x. ff. tit. De leg. et senatusc.—Cum in aliqua causa sententia legum vel senatusconsultorum manifesta est, is qui jurisdictioni præest ad similia procedere, atque ita jus dicere, debet; ibid. l. xii. Adde, l. xiii. eod. tit. et l. lxiv. ff. De condit. et demonstr.—Quod legibus omisum est non omittitur religione judicantis; l. xiii. ff. De test.

cause the true meaning of the law is to be followed by the judge, and may be frequently doubtful. (*b*)

Both these defects of all human laws are to be supplied by scrupulously logical deductions from the reasons on which the law is founded, which, in the case of immutable laws, are the *intima philosophia juris*; the practical results of which are to be found in every good system of jurisprudence; and in the instance of arbitrary law, the intention or object of the legislator, which is to be discovered by the application of rules of interpretation. It appears, then, that the law, or its fundamental grounds or reasons, must, even in these cases, be the rule of judicial determination.

But these synthetical and analytical processes should be only employed where there is need of them, for the law itself is the first and principal rule to be followed, and should therefore be preferred to adjudged cases or comments, which contain the (*c*) interpretation and the development of the law and its principles, but not the law itself.

Both decisions and the opinions of commentators must be brought to the test of the law, and the arguments on which they rest must be scrutinized by the judge in the same manner as the

(*b*) Scire leges non hoc est, verba earum tenere, sed vim et potestatem; l. xvii. ff. tit. cit. sup.

(*c*) This species of interpretation must not be confounded with that which the l. i. and l. ix. Cod. De leg. apply to.

arguments of counsel on the case before him, especially where they differ among themselves; for the authority of a great name should never be made to supersede the judge in his functions. (*d*) Authorities are to be weighed and not counted, and mere dicta or opinions, or even decisions, which rest only on the high reputation of their author, should be received with the utmost caution, or even be rejected if contrary to what the judge is convinced to be the principles of law. It is as dangerous to take a general proposition from a particular decision as it is to use a general maxim without reference to its reasons, which alone can point out the exceptions and modifications to which it is liable. The law does not come from the rule or the proposition laid down in the decision, but, on the contrary, they both derive all their force from the law (*e*), and can only be used with safety by constant reference to the reasons on which they are grounded.

Justinian gives some valuable instructions to the commissioners to whom he intrusted the

(*d*) The constitution of Valentinian III. and Theodosius *De autoritate jurisconsultorum* will probably occur to the mind of the reader. By that law the works of Papinian, Paulus, Caius, Ulpian, and Modestinus were invested with exclusive authority. Where they differed in opinion, that of the majority was to prevail, and if their numbers were equally balanced, the opinion of Papinian was to be decisive. This law has always been cited as a proof of the low state of legal science at the time when it was promulgated.

(*e*) Non ut ex regula jus sumatur, sed ut ex jure quod est, regula fiat; l. ii. ff. De reg. jur.

compilation of the Pandects, regarding their choice of authorities: "Non omnes (auctores juris) in omnia, sed certi per certa meliores vel deteriores inveniuntur; sed neque ex multitudine auctorum quod melius et æquius est iudicatur, cum possit unius forsitan et deterioris sententia et multas et majores in aliqua parte superare." (*f*) Cases may, however, occur where jurisprudence is so settled by a long and uninterrupted series of decisions by high tribunals that no judge would be justified in deciding differently from those decisions. Thus Callistratus says, "Imperator noster Severus rescripsit, in ambiguitatibus quæ ex legibus proficiscuntur, rerum perpetuò similiter judicatarum auctoritatem vim legis obtinere debere." (*g*) But, first, there must be an ambiguity or real doubt to be decided, and, in the second place, the decisions must be all on one side,—*res perpetuò similiter judicatæ*. In such cases the judge should follow the decisions, for, as Paulus says, "Minimè sunt mutanda quæ certam interpretationem semper habuerunt." (*h*) But care must, in such cases, be taken not to commit injustice by adhering to general established principles in every particular case. Modestinus says, "Etsi nihil faciliè mutandum ex

(*f*) Constit. Deo auctore, § 5. in fin. § 6. princ.

(*g*) L. xxxviii. ff. De leg. et senat. Si de interpretatione legis quæritur, inprimis inspiciendum est quo jure civitas retrò in ejusmodi casibus usa fuisset, optima enim est legum interpretis consuetudo; l. xxxvii. ff. eod. tit.

(*h*) L. xxiii. ff. De leg. et senat.

solemnibus, tamen ubi æquitas evidens exposcit subveniendum est." (i)

We may conclude, then, that both comments and decisions are, in the civil law, to be made use of as collateral and supplementary assistances and guides to the judge. But as comments give the general theory of the law and the most minute principles of its details *ex professo*, unembarrassed by questions of fact, more fully developed, as well as more leisurely and maturely digested and meditated upon, than the strepitus forensis and the comparative hurry of the despatch of judicial business will permit judicial decisions to be, the former are in general preferred by the civilians, unless a distinct proposition of law is to be found enunciated in one or more decisions. There, again, the authority of the judge or court may frequently be very inferior to that of a commentator; such, for instance, as Cujacius, Domat, or Pothier; and the arguments on which the judgment is founded may be erroneous or weak, while those of the commentator may be strong, and even irresistible. It may certainly be argued, that a judicial decision has the advantage over the opinion of a commentator, inasmuch as it is pronounced after full discus-

(i) L. clxxxiii. ff. De reg. jur. In rebus novis constituendis evidens esse utilitas debet ut recedatur ab eo jure quod diu æquum visum est; l. ii. ff. De const. princip. This maxim of Ulpian is applicable as well to new constructions of the law as to the enactment of new laws.

sion of the question in dispute by the counsel. Undoubtedly that is a strong argument in favour of the authority of decisions, and the administration of justice would be impossible if the judge was not assisted by having all the bearings of the question which he has to decide presented to his mind by advocates. The multiplicity and variety of questions totally unconnected with each other which the judge is bound to decide as they are successively laid before him, within a limited time, would certainly, without the division of labour between the tribunal and the bar, be an insurmountable difficulty to all judges but those few who are endowed with extraordinary talents. But that division of labour would be unnecessary to a man possessed of the vast juridical power of the great commentators, whose works alone are received as authority ; as, indeed, it would have been to a Mansfield, a Stowel, a D'Aguesseau, or a De Thou, but for the peculiar difficulties before referred to, against which every judge has to struggle. To such a man the arguments of counsel would only be an impediment and an annoyance, if he had not those difficulties to contend with. Besides, it is not, in many cases, comparatively, that the counsel are of the greatest ability, and they seldom have leisure to investigate the question with the greatest degree of scientific perfection of which the human mind is capable. The commentator has none of these difficulties to overcome, Supposing him to be

a man of the highest possible juridical and dialectical powers, profoundly learned, and provided with abundant assistance both from the living and the dead, he is placed in far more favourable circumstances than the judge. He has abundant latitude as to time, and his mind is not applied to a heterogeneous multitude of questions ; but his mature and deeply meditated studies are systematically devoted to the elucidation of juridical science, and its development down to its remotest practical deductions. Thus, the mature opinions of great jurisconsults are frequently far more profound, elaborate, and rich in learning than almost any judicial decision. Besides, the great jurisconsults assisted each other ; Domat worked under the eye of the chancellor D'Aguesseau, and Cujacius was in close communication with L'Hôpital. Questions were also constantly debated by colleges of jurisconsults in the universities, and those bodies communicated with each other on all questions of great importance and difficulty. Most of the great commentators were moreover judges, and were therefore daily conversant with the practical application of the law, and of course had the advantage of conferring with their colleagues in cases of doubt. It is true there are few commentators equal to the standard of greatness given above, but those few alone are to be considered as of authority, and there certainly are very few judges equal to them. The decisions of such judges, where they lay down and develope

a legal proposition, may be equal or even superior in authority to any commentator : but those decisions are *res judicata* only to the parties to the suit, and those who claim through them ; and with respect to others, their authority rests, like that of a commentator, on their intrinsic value, and on the presumption that a solemn decision of a learned court is correct.

The common law and equitable jurisprudence of England are obviously not within the scope of this disquisition, for they are to be found, not in any body of laws like the *Corpus Juris Civilis* or the *Corp. Jur. Canonici*, but in the reported decisions of the courts, which are, therefore, necessarily the highest, and indeed sole, authorities of the law, superseding every commentator.

It would, indeed, deserve to be considered whether it is not that peculiar feature of our law, namely, that it is grounded on decisions, which occasioned the paucity of commentators of authority so much dwelt upon by some of our legal writers.

The authority of adjudged cases also rests in some degree even in our law upon the natural and obvious objection to inconsistencies in judicial decisions, which tend to bring the law and the tribunals into disrepute. An advocate pleading before the senate of Venice once said, " Six months ago your excellencies decided thus, and last week your excellencies decided directly the reverse, but in both cases you decided admirably ;" the sarcasm was severe

though delicately conveyed, and the dread of some similar imputation of inconsistency no doubt must operate upon the minds of all judges. Besides, men naturally expect the decisions of the courts to be consistent, and act upon the assumption that they are so. What weight these arguments ought to have under the peculiar circumstances of our law this is not the place to examine, but in the civil and canon law they must be received subject to the limitations before explained. Undoubtedly the judgment of a high court is a *prejudicium* as well as the opinion of a great writer, for they are probably correct, and the courts profess to attend with respect to both those authorities. But the law is a greater authority still, and the judges are sworn to decide according to law. It follows then that if the court are convinced that the authorities are not consonant to the law, they are unjustifiable in not acting upon their own conviction, though where the court is doubtful the question should be decided by the weight of authorities.

Unless the science of jurisprudence is in a degraded state, and the tribunals are occupied by magistrates without solidity or extent of learning and a vigorous sense of justice, but indebted for their knowledge only to the daily practice of the courts, the maxim *legibus non exemplis judicare oportet* must prove the source of as great certainty in the application of the law as is reconcilable with the exact and scru-

pulous administration of justice in each individual case.

It is only by following these doctrines, and by never losing sight of the *true sources of the law*, that jurisprudence can be preserved pure and be maintained as a science formed of law, truth, and justice, and not grounded upon the opinions of judges and commentators, which, however respectable, are not the law itself.

THE END.

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